Supreme Court, U. S.
FILED
MAR 15 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-911

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

ROBBINS TIRE AND RUBBER COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 23, 1977
CERTIORARI GRANTED FEBRUARY 21, 1978

Supreme Court of the United States

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INDEX

	Page
CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES,	1
COMPLAINT, dated April 13, 1976	3
PETITION, filed August 7, 1975	10
REPORT ON CHALLENGED BALLOTS AND OBJECTIONS, dated February 11, 1976	11
DECISION AND DIRECTION, dated April 6, 1976	24
CHARGE AGAINST EMPLOYER, filed February 4, 1976	26
AMENDED CHARGE AGAINST EMPLOYER, filed March 3, 1976	27
COMPLAINT AND NOTICE OF HEARING, dated March 26, 1976	28
ANSWER, dated March 31, 1976	36
REQUEST FOR RECORDS UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT, dated March 31, 1976	37
DENIAL OF REQUEST FOR RECORDS, dated April 2, 1976	39
APPEAL FROM REQUEST FOR RECORDS UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT, dated April 8, 1976	43

Page

APPLICATION FOR TEMPORARY RESTRAINING ORDER, filed April 15, 1976 46

AFFIDAVIT, filed April 15, 1976 48

MOTION TO DISMISS COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, filed April 15, 1976 50

OPPOSITION TO COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF, filed April 15, 1976 51

JUDGMENT, dated April 15, 1976 59

MEMORANDUM OF DECISION, filed April 16, 1976 60

ORDER, filed April 16, 1976 65

NOTICE OF APPEAL, filed April 22, 1976 66

TRANSCRIPT OF PROCEEDINGS, dated May 14, 1976 68

EMERGENCY MOTION FOR STAY PENDING APPEAL, dated April 20, 1976 96

PLAINTIFF-APPELLEE'S RESPONSE TO EMERGENCY MOTION FOR STAY PENDING APPEAL, dated April 22, 1976 99

ORDER DENYING EMERGENCY MOTION, dated April 26, 1976 107

DECISION OF THE COURT OF APPEALS, dated November 21, 1977 108

JUDGMENT OF THE COURT OF APPEALS, dated November 21, 1977 130

ORDER OF THE SUPREME COURT GRANTING CERTIORARI, dated February 21, 1978 131

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE

1976

4.15.76 Complaint filed with acceptance of service for deft by Mr. William E. Caldwell

4.15.76 Application of plff for temporary restraining order filed

4.15.76 Affidavit of William M. Ernest filed

4.15.76 Certificate of service filed

4.15.76 Motion of deft to dismiss complaint and request for injunctive relief, or in the alternative for summary judgment filed—served in open court by counsel

4.15.76 Opposition of deft to complaint and request for injunctive relief filed—served in open court by counsel

4.15.76 On hearing on application for temporary restraining order before the Hon. James H. Hancock at Birmingham, AL (JOHN WEAVER, reporting)—court's preliminary statements—attorney's statements to the Court—no testimony heard—the Court orders that the hearing on the merits is hereby advanced and consolidated with application for injunctive relief, and taken under advisement

4.15.76 Clerk's Court Minutes entering judgment on decision by the court that his matter is taken under advisement—filed and entered

4.16.76 Memorandum of decision, filed and entered. JHH. cm

DATE

1976

4.16.76 Order adjudging, decreeing and declaring that the information sought by plaintiff constitutes public information within the meaning of the Freedom of Information Act, with respect to which plaintiff is entitled to inspection and copying, and ordering that the Board shall turn over to the plaintiff copies of said material on or before Apr 22, 1976, or, at the election of the Board, on or before a date which is at least 5 days prior to any hearing, etc., and taxing costs to the defendants, filed and entered, JHH cm

4.22.76 Notice of appeal of deft from judgment entered Apr 16, 1976 filed—cs (certified copies mailed to USCA and attys)

4.27.76 Certified record on appeal mailed to USCA (certified copies of docket entries mailed to attys with letter)

4.20.76 Emergency Motion for stay pending appeal, filed

4.22.76 Response to Emergency motion for stay of appeal, filed

4.26.76 Order denying Emergency Motion, dated

11.21.77 Decision of the Court of Appeals, dated

11.21.77 Judgment of the Court of Appeals, dated

2.21.78 Order of the Supreme Court granting certiorari

[April 13, 1976]

* * * * *

[3]

COMPLAINT

Plaintiff, ROBBINS TIRE AND RUBBER COMPANY, for its Complaint against the Defendant, NATIONAL LABOR RELATIONS BOARD (hereinafter also "the Board"), respectfully alleges as follows:

I. NATURE OF THE ACTION

1. This is an action under the Freedom of Information Act to require public disclosure of statements and affidavits obtained by agents of the National Labor Relations Board during the Board's investigation of an unfair labor practice charge against the Plaintiff resulting in the issuance of a Board complaint and during the Board's investigation of objections to a representation election. Plaintiff seeks herein injunctive relief against Board proceedings pending such disclosure.

II. JURISDICTION

2. This Court has jurisdiction of this action pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552(a)(4)(B), the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, and the All Writs Statute, 28 U.S.C. § 1651.

[4]

III. THE PARTIES

3. Plaintiff, ROBBINS TIRE AND RUBBER COMPANY, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of the laws of, the State of Alabama, with its principal offices and place of business located at Sixth Street, in the County of Colbert and State of Alabama.

4. Plaintiff is, and has been at all times material herein, engaged in the manufacture and sale of rubber products in the State of Alabama.

5. Plaintiff, ROBBINS TIRE AND RUBBER COMPANY, is a member of the public within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), and a person within the meaning of that statute, 5 U.S.C. § 552(a)(3), as well as of the Administrative Procedure Act, 5 U.S.C. § 551(2).

6. Defendant, NATIONAL LABOR RELATIONS BOARD, is an administrative agency of the United States Government, created pursuant to the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.*, with its principal offices located at 1717 Pennsylvania Avenue, N.W., in the City of Washington, District of Columbia.

7. Defendant Board and its agents constitute an "agency" with the meaning of the Freedom of Information Act, as amended, 5 U.S.C. § 552(e).

IV. FACTUAL ALLEGATIONS

8. On August 7, 1975, the Aluminum Workers International Union, AFL-CIO (hereinafter "Aluminum Workers", a labor organization, filed in Case No. 10-RC-10410 a Petition for an election (EXHIBIT A hereto). Pursuant to a Stipulation for Certification Upon Consent Election, approved by the Board's

Acting Regional Director on August 29, 1975, a secret ballot election was conducted on October 9, 1975 among employees in the appropriate voting unit.

9. On October 16, 1975, the Aluminum Workers filed objections to the election and an investigation of these objections was subsequently made by agents of the Board. During this investigation, agents of the Board secured affidavits and/or written statements of various individuals. After completing the investigation, the Board's Regional Director on February 11, 1976, issued his Report on Challenged Ballots and Objections (EXHIBIT B hereto).

10. On April 6, 1976, the Board adopted (EXHIBIT C hereto) the Regional Director's Report on Challenged Ballots and Objections, which directed that a hearing be held if the Aluminum Workers, after challenged ballots were opened, did not receive a majority of the valid votes cast. The Aluminum Workers did not receive such a majority and a hearing has been set for April 27, 1976, concerning issues raised by the election objections.

11. On February 4, 1976, Gene E. Newton, an individual, filed in Case No. 10-CA-11762 an unfair labor practice charge, alleging that Plaintiff had violated § 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1) and (3) (EXHIBIT D hereto).

12. On March 3, 1976, after investigation by agents of the Board during which affidavits and/or written statements were taken of certain individuals, the unfair labor practice charge was amended, deleting the § (a)(3) allegation (EXHIBIT E hereto).

13. On March 26, 1976, the Board's Acting Regional Director issued a Complaint and Notice of Hearing (EXHIBIT F

hereto) against Plaintiff herein, alleging some forty (40) instances of alleged violations. The hearing on these allegations has been set for April 27, 1976.

14. On March 31, 1976, Plaintiff herein duly interposed its Answer to the Complaint, denying the material allegations of the Board Complaint. A copy of Plaintiff's Answer to the Complaint is attached hereto as EXHIBIT G.

15. Pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), and the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.117(c)(1), Plaintiff on March 31, 1976 by hand delivered letter requested of the Board's Acting Regional Director Cohen that copies of all written statements, signed or unsigned, contained in the Board's case files with respect to those witnesses which the Board will call to testify at the April 27, 1976 hearing in Cases Nos. 10-CA-11762 and 10-RC-10410 be made available for inspection and copying by Plaintiff at least seven (7) days prior to the start of

the hearing. Plaintiff agreed to assume full financial liability for all charges incurred in responding to the request. A copy of Plaintiff's request is attached hereto as EXHIBIT H.

16. By letter dated April 2, 1976, Acting Regional Director Cohen denied Plaintiff's request, asserting that the statements which were requested "are privileged from disclosure by Exemptions 5 and 7(A), (C) and (D) of Section 552(b) of the Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. Section 552(b)(5), 7(A), 7(C) and 7(D)." Acting Regional Director Cohen advised, however, that review of his determination might be had pursuant to 29 C.F.R. § 102.117(c)(2)(ii) by appealing to the Board's General Counsel. Acting Regional Director Cohen's letter is attached hereto as EXHIBIT I.

[7]

17. On April 8, 1976, by air mail, special delivery letter, Plaintiff duly appealed the determination of Acting Regional Director Cohen to the Board's General Counsel, John S. Irving. A copy of this appeal is attached hereto as EXHIBIT J.

18. Even though the Board's General Counsel has not yet ruled on this Plaintiff's appeal, Plaintiff has filed this action now because the hearing in Cases Nos. 10-CA-11762 and 10-RC-10410 is scheduled for April 27, 1976 and the Board's firm policy has been to refuse to produce the type of information sought herein. The Board's later denial of Plaintiff's appeal would prohibit Plaintiff from obtaining prior to the April 27, 1976 hearing the requested information under the Freedom of Information Act.

V. FURTHER ALLEGATIONS

19. Upon information and belief, all of the information sought by Plaintiff is within the provisions of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a)(3), and is required to be disclosed by the Defendant.

20. Defendant's failure and refusal to furnish the requested information is arbitrary and capricious, and deprives Plaintiff of public information to which it is entitled to access.

21. If Plaintiff does not receive the requested information a reasonable time prior to the hearing scheduled for April 27, 1976 in Board Cases Nos. 10-CA-11762 and 10-RC-10410, Plaintiff will be wrongfully precluded from properly preparing its defense to the allegations contained in the Board's Complaint and those set forth in the Report on Challenged Ballots and Objections. Plaintiff will thereby suffer

[8]

irreparable injury for which no adequate remedy at law exists.

VI. RELIEF REQUESTED

WHEREFORE, for all of the foregoing reasons, Plaintiff prays that this Court order, adjudge and decree that:

1. The information sought by Plaintiff, i.e. written statements now or hereafter contained in the Board's case files with respect to those witnesses which the Board will call to testify at the April 27, 1976 hearing in Cases Nos. 10-CA-11762 and 10-RC-10410 constitutes public information within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), with respect to which Plaintiff is entitled to inspection and copying.
2. Defendant be enjoined from withholding such agency records from Plaintiff.
3. At least seven (7) days prior to the start of the hearing Defendant be required to produce for inspection and copying by Plaintiff such agency records.
4. Defendant Board and its agents be preliminarily enjoined from conducting its administrative hearing in Cases Nos. 10-CA-11762 and 10-RC-10410 now scheduled for April 27, 1976, until the final resolution of the allegations contained herein.

5. Defendant Board and its agents be permanently enjoined from conducting its administrative hearing in Cases Nos. 10-CA-11762 and 10-RC-10410 until at least seven (7) days after Defendant provides the requested statements and/or affidavits to Plaintiff.

6. Plaintiff be awarded reasonable attorneys' fees and other litigation costs reasonably incurred in this action;

and such other and further relief as to the Court may seem reasonable and proper in the circumstances.

And Plaintiff further prays that, in accordance with the Freedom of Information Act, as amended, 5 U.S.C. § 552(a)(4)(D), except as to cases the Court considers of greater importance, proceedings herein take precedence on the docket over all

[9]

cases and be assigned for hearing or trial or for argument at the earliest practicable date and expedited in every way.

Respectfully submitted,

POELLNITZ, COX, ROBISON,
MCBURNEY & JONES

By: /s/ C. A. Poellnitz

ELARBEE, CLARK & PAUL

By: /s/ William M. Earnest
Attorneys for Plaintiff

ELARBEE, CLARK & PAUL
750 Coastal States Building
Atlanta, Georgia 30303
(404) 688-8000

POELLNITZ, COX, ROBINSON, MCBURNEY & JONES
P. O. Box 876
Florence, Alabama 35630
(205) 764-0821

STATE OF ALABAMA)
)
COUNTY OF LAUDERDALE)

Comes Wilmer E. Maddox, Personnel Manager for Robbins Tire and Rubber Company, Inc., the plaintiff herein, who is known to me and who, being first duly sworn, states that the allegations of fact in the foregoing complaint are true and correct, to the best of his knowledge, information and belief.

This the 13th day of April, 1976.

/s/ Wilmer E. Maddox
WILMER E. MADDOX

Sworn to and subscribed before me
on this the 13th day of April, 1976.

/s/ Imogene Ward
Notary Public

[SEAL]

Form NLRB-502
(2-71)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved.
Budget Bureau No. 64-R002.14

PETITION

DO NOT WRITE IN THIS SPACE

Case No. 10-RC-10410

Date Filed 8-7-75

INSTRUCTIONS—Submit an original and four (4) copies of this Petition to the NLRB Regional office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

Purpose of this Petition (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)

(Check one)

☒ RC-CERTIFICATION OF REPRESENTATIVE—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

☐ RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

☐ RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

☐ UD-WITHDRAWAL OF UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

☐ UC-UNIT CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees. (Check one) ☐ Is/are not previously certified.
☐ Is/are previously certified in Case No. _____

☐ AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____
Attach statement describing the specific amendment sought.

1. NAME OF EMPLOYER	2. EMPLOYER REPRESENTATIVE TO CONTACT	3. PHONE NO.
Robbins Tire and Rubber Company	Deke Wann	383-5461

4. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED (Street and number, city, State, and ZIP Code)
Two Plants - 6th St., Muscle Shoals, Al. & 6th St., Tuscumbia, Al.

5. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.) | 6. IDENTITY OF PRINCIPAL PRODUCT OR SERVICE
Factory | Rubber Products

7. Unit involved (In UC petition describe PRESENT bargaining unit and attach description of proposed clarification.)

Included

All production and Maintenance employees including lead-persons and cafeteria workers.

Excluded

Office Clerical, Guards, Professional Employees, as defined in the Act.

(If you have checked box RC in 1 above, check and complete EITHER item 8a or 8b, whichever is applicable)

8a. ☐ Request for recognition as Bargaining Representative was made on _____ (Month, day, year) and Employer declined recognition on or about _____ (Month, day, year) (If no reply received, so state)

8b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

9a. Recognized or Certified Bargaining Agent (If none, so state)

NAME	AFFILIATION
NONE	
ADDRESS	DATE OF RECOGNITION OR CERTIFICATION

6a. NUMBER OF EMPLOYEES IN UNIT: Present: approx. 500 | Proposed (by UC/AC): _____

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT? ☒ YES ☐ NO
*Not applicable in RM, UC, and AC

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Month, day, and year)

10. IF YOU HAVE CHECKED BOX UD IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year)

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES _____ NO X

11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF _____ (Insert name) A LABOR ORGANIZATION, OF _____ (Insert address) SINCE _____ (Month, day, year)

12. LIST ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c) WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (IF NONE, SO STATE)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)
None known to us			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Aluminum Workers International Union, AFL-CIO
(Petitioner and affiliation, if any)

By W. B. Rutledge
(Signature and title or office held)

Regional Director
(Title, if any)

Address P. O. Box 99, Russellville, Al. 35653
(Street and number, city, State, and ZIP Code)

205 332-4677
(Telephone number)

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

EXHIBIT A

GPO 861-598

BEST COPY AVAILABLE

EXHIBIT B

[11]

[February 11, 1976]

* * * * *

REPORT ON CHALLENGED BALLOTS AND OBJECTIONS

The petition in the above-entitled proceeding was filed on August 7, 1975. Pursuant to a Stipulation for Certification Upon Consent Election approved August 29, 1975, an election by secret ballot was conducted on October 9, 1975, among the employees in the appropriate unit to determine the question concerning representation.[1] Upon conclusion of the balloting the parties were furnished a tally of ballots which showed that of approximately 537 eligible voters, 244 cast valid votes for and 248 cast valid votes against the Petitioner. There were 2 void ballots and 10 challenged ballots. The challenged ballots are sufficient in number to affect the results of the election. On October 16, 1975, the Petitioner filed timely objections to the election and a copy thereof was timely served on the Employer.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the issues raised by the challenged ballots and objections has been conducted and the undersigned, having considered the results thereof, makes the following findings and recommendations to the Board:

---

[1] The appropriate unit is: "All production and maintenance employees, including truck drivers and shipping, receiving and inventory clerks and all other plant clerical employees, employed by the Employer at its Plant Numbers 1 and 2 located, respectively, in Muscle Shoals City, Alabama and Tuscumbia, Alabama, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act."

THE CHALLENGED BALLOTS

Thelma M. Borden, Martin G. McKay, Robert W. McCorkle, D. H. Kimbrough, and *James Trousdale* were challenged by the Petitioner on the ground that they are supervisors. No evidence was presented by the Petitioner to show that any of these above-named employees possess any of the indicia of supervisory authority as defined in Section 2(11) of the Act and the Employer denied that they are supervisors. Therefore, the undersigned finds them to be eligible voters.

J. D. Colburn was challenged by the Board agent because his name did not appear on the eligibility list for the payroll period ending August 24, 1975. According to the Employer's personnel records, Colburn was terminated on September 8, 1975. Inasmuch as Colburn was not employed on the date of the election, the undersigned finds that he is not an eligible voter.

Larry W. Kirby was challenged by the Board agent because his name was not on the eligibility list. Personnel records on Kirby show that he was hired on August 28, 1975. The eligibility date for the election was August 24, 1975, and, inasmuch as Kirby was not employed on that date, he is not an eligible voter.

James M. Johnson was challenged by the Board agent because his name did not appear on the voting list at the polling place at which he appeared to vote (there were two polling places). However, his name does appear on the voting list at the other location and was not stricken from that list, indicating he did not vote there. The payroll records indicate that Johnson was hired on June 4, 1974, and was working on the day of the election as a driver. Therefore, the undersigned finds that Johnson is an eligible voter.

Ronald Vernon was challenged by the Board agent because his name was not on the eligibility list. According to Vernon, and corroborated by Employer records, he was hired May 24, 1973, and worked continuously

until he went on military leave in May 1975. Inasmuch as Vernon was continuously employed by the Employer, being on a military leave of absence, and had returned to work and was working on the day of the election, the undersigned finds him to be an eligible voter.

The Petitioner objected to the Board agent's ruling on a ballot during the count of the ballots on the ground that the identity of the voter is revealed by certain fingerprints or thumbprints that appear as smudges on the ballot. In the opinion of the undersigned, such inadvertent marks left by a workers' soiled hands do not reveal the voter's identity. Therefore, since the secrecy of the ballot is not disturbed and the voter's intent is clearly shown, the undersigned finds this to be a valid ballot.

OBJECTIONS

By letter dated November 11, 1975, the Petitioner requested withdrawal of its Objections number 2, 3, 4, 5 and 6. Such request is hereby granted.

OBJECTION 1:

> The Employer, through its representatives, made threats to take away their Bonus and other Benefits if the Employees voted for the Union.

The Petitioner presented two employees as witnesses with respect to this objection. One witness stated that on or about October 8, 1975, the supervisor in the cove base department, James Cooley, told this employee that the Employer would take away the employees' Christmas bonus if the Union came in. According to this witness, no one else was present when this conversation took place.

Cooley denied that he told any employee that he thought the Employer would take away the Christmas bonus if the Union came in. Since there were, admittedly, no witnesses to this alleged conversation, a credibility issue exists.

[14]

Another employee witness testified that on or about October 7, 1975, Personnel Manager Billy Irons, during a conversation which took place in the cove base department, stated the Company would never do anything else for that employee if he voted against the Company. This statement is completely denied by Irons. Thus, both of the above incidents present credibility issues which may best be resolved by record testimony in a hearing.

Several employee witnesses stated that during two meetings held prior to the election, one about a month prior to and the other within a week of the election, the Employer's Executive Vice-President Poncet Davis, Jr., spoke to them and told the employees that any negotiations with the Union on wages could begin with the minimum wage and that the employees could lose their Christmas bonus through negotiations. Davis also allegedly told the employees, in reference to a strike at the Employer's plants which occurred in the early 1960's, that, if the Union came in it would happen again and it was possible the plant would not reopen this time. All of the witnesses were in agreement that Davis read his speeches from prepared texts.

While complete copies of Davis' two speeches were not presented by the Employer, the portions of those speeches applicable to the above allegations were presented through the sworn statement of Personnel Manager Wilmer E. Maddox who was present when both speeches were given and who had copies of both speeches with him and followed along as Davis spoke.

According to Maddox, there was nothing said during the first speech, which was given during meetings on September 10, 1975, with reference to wage negotiations beginning with the minimum wage. Davis did refer to a strike at Robbins in the early 1960's which involved this same Union and made the following statements:

[15]

> There was a 7½ week strike mainly because the Company would not grant a check-off. Consider

> what can happen to a company's business when there is a strike. Look at Union Aluminum (UALCO) in Sheffield. After a devastating strike it never reopened. All of its business had gone to competitors, and there was no business to go home to. If we have a strike which shuts down the plant for any period of time, our customers may go elsewhere to get tubes and cove. Then if we come back after a strike and say to our customers, "We are back, give us an order." Most of them may say, "We are happy you are back, but we have a new supplier. If you want our business again, give us a price discount, to get back in." Then we give a price discount, and say we start up again. What does that do to company profits and wage increases. The company profit is crippled, and where does the money come for wage increases?
>
> Go down to Sheffield at Raleigh & 3rd Street, and drive around the empty Union Aluminum plant which once worked many hundreds of people. This same Aluminum Workers Union got in there and said they would help. Did the union help? Every employee lost his job. What happened—a 19-month strike. The company went out of business. Who got hurt? Who got hurt—the employees and their families, that's who got hurt. All lost their jobs. I hope that doesn't happen here at Robbins.

The only statement made by Davis about losing the Christman bonus was "All employees lost in negotiations their Christmas bonus for that year and never got it back."

Davis' second speech was given on October 7, 1975. Davis said the following with respect to negotiations beginning with the minimum wage:

> The Company and the Union don't have to start negotiations from where you are now. You should know before you vote, negotiations can start from the minimum wage and no benefits. Even from where our wages and benefits are now, negotiations can go up or go down.

With respect to the subject of the Christmas bonus Davis said:

> You know the Union in negotiations lost the employees their Christmas bonus that year. The Company will not take away the Christmas bonus because the Union might be voted in. However, if this Union is voted in here, your Christmas bonus is going to be up for negotiation. When this same Union got in here before, the Christmas bonus was up for negotiation. Your Christmas bonus was not paid after negotiations with this same Union.

[16]

> I'd ask the Union what happened last time they got in and promised a lot and actually lost the employees' paychecks for 7½ weeks and their Christmas bonus in negotiations.

Davis made the following statements with respect to strikes:

> I have asked our auditors to give me a report on how a strike could affect the company. They tell me a long strike would mean limited production by supervisors and others that would work. We would have two choices. The company might be able to continue limited production, and try to get other companies to stamp the Robbins or Western or Flexco brand on our products for us, and ship direct to our customers for us. Or we might have to liquidate, and the family put what's left into other investments, since to start up again, giving price discounts which I told you about would be terrible. The UALCO plant in Sheffield had to liquidate, and never started up again because of the Aluminum Workers' strike. Finally, I'd ask the union pushers two last questions. How much money they will give you to live on during a long strike, and for how long. Secondly, ask if this very same union has actually broken other companies Robbins' size, like UALCO. Then I'd ask one of the union guys to actually drive me around

> the dead UALCO plant at Raleigh and 2nd in Sheffield, and explain "WHAT HAPPENED." What happened here, to all the fancy union promises, of how the union could make the company do anything.

There have been no allegations made nor evidence presented by the Petitioner that the factual situations referred to in Davis' speeches, such as to the strikes at Robbins and at UALCO during the early 1960's are misrepresentations. In the opinion of the undersigned, the statements made by Davis do not constitute threats of job loss or benefit loss, but are subject to voter evaluation and within the realm of permissible campaign propaganda, and, thus not objectionable.

OBJECTION 7:

Removing Union Buttons from employees' clothing. One employee alleged that about two weeks prior to the election, packing department Supervisor Donald Pennington grabbed a union button off this employee's shirt pocket and put it in his own pocket. Three or four other employees, whose identity this witness could not recall, were standing in close vicinity when this incident took place.

[17]

According to the Employer, Pennington is no longer employed by the Employer and, thus, was not available for a response.

Another employee alleged that about three to four weeks prior to the election, lap splicing department Supervisor Tom Ellett removed a union button from that employee's shirt while two other employees were present. Ellett admitted that, perhaps three weeks prior to the election, he had a conversation with an employee in the lap splicing department about the Union and that this was only one of many such voluntary discussions between Ellett and that employee concerning the subject. At one point during the conversation the employee pointed to a union button he had on his shirt pocket and said that he was not going to vote for the Union but was

merely wearing the button to keep the other employees from bothering him. The employee pointed to the button again and said that Ellett could have it if he wanted it. Thus, Ellett reached over, unclasped the button (perhaps with the assistance of the employee), and removed the button. Ellett stated that this was the only time he took a button from any employee and that he had not asked for the button in this instance. Ellett couldn't recall if anyone else was around when this took place.

An employee on the 7 a.m. to 3 p.m. shift alleged that a few days prior to the election, as he was leaving the plant at the end of his shift, he was stopped by evening shift Supervisor William Daniel. Daniel pointed to a pen clasp that the employee had on his shirt pocket which had a Union insignia upon it and asked why the employee was advertising the Union. The employee replied that it was a good pen holder. Daniel then pulled the holder out of the employee's shirt pocket, turned it around so the insignia wouldn't show, and replaced it, saying as he did so that he would get the employee a better one. Danied admitted that one day prior to the

election as he was coming in at the start of his shift, he passed a friend of his. According to Daniel, the employee pulled his jacket open to reveal his shirt pocket and told Daniel to see what a good pencil holder he had. Daniel looked at the pen holder with the Union insignia on it and replied that it was a good one but he, Daniel, could get him a better one. Daniel stated that this was all that was said and denied that he touched the pen holder at all.

In the opinion of the undersigned, the above incidents described by the employee witnesses, and the denials thereof by the supervisors, raise credibility issues which may be best resolved by record testimony at a hearing.

OBJECTION 8:

Making threats to discharge employees for engaging in Union activities.

One employee witness alleged that on or about October 8, 1975, Personnel Manager Billy Irons asked him, while out in the plant, how he was going to vote. When the employee replied that he hadn't decided, Irons allegedly replied that he was disappointed in this employee and thought that perhaps he (Irons) had made a mistake in hiring him. Irons denied that he asked any employee how he was going to vote or that he told any employee, in connection with a discussion of the Union, that he, Irons, felt he had made a mistake in hiring him.

Another witness, who does not work for Robbins but who is the brother of an employee, stated that about a month prior to the election, Supervisor Buck Collins stopped by this witness' home and asked if there were any job openings where this individual worked. When this witness asked who needed a job, Collins allegedly replied that this witness' brother (the Robbins employee) might. When asked if that was because of the Union, Collins allegedly replied that it was. Collins, on the other hand, stated that he stopped at a local gas station one day prior to the election and saw an employee's

brother there who asked Collins if he had any jumper cables. Collins replied that he did not, but the station owner overheard and replied that he had some. The three of them then walked over to this person's car and attempted to get it started. At some point, Collins was asked how the Union was coming along at Robbins to which Collins replied that it looked good. According to Collins, that was all that was said about the Union and he denied asking about any job openings or inferring that the Robbins' employee might need a job because of the Union.

Another employee alleged that Supervisor Collins warned him about a week prior to the election that he would be "run off" if he didn't quit pushing the Union. The employee's wife and grandmother also alleged that Collins called them at their home prior to the election, warning them that this employee would lose his job

if he didn't leave the Union alone. Collins denied that any such incidents took place.

Such credibility issues as raised by the above objection may best be resolved by record testimony at a hearing.

OBJECTION 9:

> A representative of management engaged in electioneering within a plain sight of the entrance way to the voting area, while the employees were going to vote.

Several employees alleged that they viewed certain management officials, namely Wilmer Maddox and Billy Irons, standing inside an entrance way some 15 to 20 feet from the entrance to the cafeteria at Plant No. 1 where the polling place was located. However, none of these witnesses recalled anything being said to them by either Maddox or Irons other than a casual greeting. Both Maddox and Irons admit that they were in the plant area in question during the time the polls were open but that they were only there to insure that certain equipment in that building which needed close attention was

[20]

not left unattended and to be sure that all employees were given an opportunity to go vote. Both deny that they said anything to any rank-and-file employees while the polls were open. Absent any evidence of interference on the part of these Employer officials, the undersigned finds Objection 9 to be without merit.

OBJECTION 10:

> Promising to give certain employees an extra bonus if they voted against Union representation.

Four employees presented by the Petitioner alleged that various supervisors, including cove base department Supervisor Leonard McCormick, tread rubber department Supervisor Sam Styles, and lap splicing department Supervisor James Borden, told them the Employer intended to give the employees a three-week Christmas bonus instead of the usual two-week bonus if the Union didn't come in. All three supervisors denied that they told any employees they would receive an extra Christmas bonus if the Union was not voted in. Another employee witness stated that on two separate occasions within a week and a half of the election he asked production belt Supervisor Roger Crittenden if the employees would receive an extra Christmas bonus and Crittenden allegedly said that they might possibly get an extra bonus but he couldn't say for sure, that the last time the Union came in the employees did not get any bonus. While Crittenden admitted that several employees asked him, prior to the election, about the possibility of an extra Christmas bonus, he denied that he said they might possibly get an extra bonus. According to Crittenden, he told any employee who asked that he knew nothing about an extra Christmas bonus. The foregoing allegations and denials thereof raise credibility issues which may best be resolved by record testimony in a hearing.

OBJECTION 11:

> Other conduct not specifically alleged but adduced by the investigation.

[21]

One employee alleged that on the evening of October 8-9, prior to the opening of the polls, Vice-President of Production Deek Wann came over to him and asked him why he was for the Union and what had the Union ever done for him. (According to this witness, another employee had stuck a union sticker on his back.) Wann allegedly stated that the Employer had done a lot for the employee by hiring him and training him and that he should be a good employee and vote against the Union. This employee replied that he would make up his mind when he went to vote. Wann admitted that he talked to numerous employees on the evening prior to the opening

of the polls, but could not recall seeing any employee with a union sticker on his back and denied making any statements as alleged.

Another employee alleged that he and a relative of his who is also employed at Robbins approached mill room Supervisor Tommy Dickens about two weeks prior to the election and asked Dickens to serve as a reference for a relative of theirs who was seeking employment at Robbins. According to both witnesses, Dickens asked them if the prospective employee was a union man or not. Dickens admitted that he is frequently asked by Robbins' employees to serve as a reference for a friend or relative who is seeking employment there. However, Dickens could not recall anyone asking him during the month prior to the election and pointed out that Robbins was not even hiring at that time. Dickens also denied that he ever asked any employee whether a prospective employee was pro-union or not.

One of the above employee witnesses also alleged that on the same day as above he went to see Superintendent Harry Meadows and also asked Meadows to serve as a reference for his relative who was applying for a job. According to this witness, Meadows asked if the applicant was a union man and stated that the Employer didn't need any more troublemakers in the plant. Meaddows could not recall any

employee asking him to serve as a reference during the time immediately preceding the election and also pointed out that the Employer was not hiring at that time. He specifically denied that he ever asked any employee is a job applicant was for the Union or that he stated, in reference to the Union, that the Employer didn't need any more troublemakers.

These above alleged incidents raise credibility issues which may best be resolved by record testimony at a hearing.

FINDINGS AND RECOMMENDATIONS

For the reasons stated above, the undersigned finds *J. D. Colburn* and *Larry W. Kirby* to be ineligible voters and recommends to the Board that the challenges to their ballots be sustained and that *Thelma M. Borden, Martin G. McKay, Robert W. McCorkle, D. H. Kimbrough, James Trousdale, James M. Johnson* and *Ronald Vernon* are eligible voters and the ballot challenged by the Petitioner as revealing the identity of the voter is a valid ballot and recommends to the Board that those challenges be overruled, the ballots be opened and counted and, upon the basis of which, a Revised Tally of Ballots issue. If said Revised Tally of Ballots shows the Petitioner to have received a majority of the valid votes counted, it is recommended that a Certification of Representative issue. Should the revised tally show the Petitioner not having received a majority of the valid votes counted, it is recommended that Petitioner's Objection 9 be overruled and that a hearing be ordered to resolve the issues raised by the Petitioner's Objections 1, 7, 8, 10, and 11.[2]

Dated at Atlanta, Georgia, this 11th day of February 1976.

/s/ Walter C. Phillips
Walter C. Phillips,
Regional Director
National Labor Relations Board
730 Peachtree Street, N.E.,
Room 701
Atlanta, Georgia 30308

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[2] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by February 24, 1976.

EXHIBIT C

[23]

[April 6, 1976]

* * * *

DECISION AND DIRECTION

Pursuant to authority granted it under Section (b) of the National Labor Relations Act, as amended, a three-member panel has considered determinative challenges and objections in an election held October 9, 1975,[1] and the Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings and recommendations.

DIRECTION

IT IS HEREBY DIRECTED that the Regional Director for Region 10 shall, pursuant to the Rules and Regulations of the Board, within 10 days from the date of this Direction, open and count the smudged ballot and the ballots of Thelma M. Borden, Martin G. McKay, Robert W. McCorkle, D. H. Kimbrough, James Trousdale, James M. Johnson and Ronald Vernon and, thereafter, prepare and cause to be served upon the parties a revised tally of ballots, including therein the count of said ballots. In the event that the revised tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, the Petitioner's objections will be moot, and the Regional Director shall issue the appropriate certification of representative.

IT IS FURTHER DIRECTED that in the event the revised tally of ballots shows that the Petitioner has not received a majority of the ballots cast, a hearing be held before a Hearing Officer, to be designated by the Regional Director for

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 244 for, and 248 against, the Petitioner; there were 10 challenged ballots.

[24]

The purposes of taking evidence with respect to the issues raised by Objections 1, 7, 8, 10 and 11.

IT IS FURTHER DIRECTED that the Hearing Officer designated for the purpose of conducting such a hearing shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within 10 days from the issuance of such report either party may file with the Board in Washington, D.C., an original and 7 copies of the exceptance thereto. Immediately upon the filing of such exceptions the parties filing the same shall serve a copy on the other party and file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

IT IS FURTHER DIRECTED that the above entitled matter be, and it hereby is, referred to the said Regional Director for the aforementioned purpose, including the purpose of conducting a hearing if necessary, and the Regional Director be, and hereby is, authorized to issue Notice thereof.

Dated, Washington, D.C. April 6, 1976.

John H. Fanning, Member

John A. Penello, Member

Peter D. Walther, Member
National Labor Relations Board

[SEAL]

(25)

Form Approved
Budget Bureau No. 44-R001.11

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 10-CA-11763

Date Filed 3-4-76

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Robbins Tire and Rubber Company

b. Number of Workers Employed: 500

c. Address of Establishment (Street and number, city, State, and ZIP code): Sixth Street, Tuscumbia, Al bama 35674

d. Employer Representative to Contact: Duke Wann

e. Phone No.: 383-5441

f. Type of Establishment (Factory, mine, wholesale, etc.): Factory

g. Identify Principal Product or Service: Inner tubes

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) (If this subsection) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about December 11, 1975, the Employer, in order to discourage membership in a labor organization, discriminated in regard to the hire and tenure of employment and to the terms and conditions of employment of its employee, Gene E. Newton.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Gene E. Newton

4a. Address (Street and number, city, State, and ZIP code): 1401 Courtview Towers, 201 No. Pine St., Florence, Ala. 35630

4b. Telephone No.: 766-6487

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: [signature] (Signature of representative or person filing charge) — An Individual (Title, if any)

Address: 1401 Courtview Towers, 201 No. Pine Street, Florence, Ala. 35630 — 766-6487 (Telephone number) — 2-26-76 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 887-573

EXHIBIT D

(26)

Form Approved
Budget Bureau No. 44-R001.11

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AMENDED

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 10-CA-11763

Date Filed 3-3-76

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Robbins Tire and Rubber Company

b. Number of Workers Employed: 500

c. Address of Establishment (Street and number, city, State, and ZIP code): Sixth Street, Tuscumbia, Alabama 35674

d. Employer Representative to Contact: Duke Wann

e. Phone No.: 383-5441

f. Type of Establishment (Factory, mine, wholesale, etc.): Factory

g. Identify Principal Product or Service: Inner tubes

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and _____ (If this subsection) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about August 7, 1975, and thereafter, the Employer has committed acts and conduct which interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Gene E. Newton

4a. Address (Street and number, city, State, and ZIP code): 1401 Courtview Towers, 201 No. Pine Street, Florence, Ala 35630

4b. Telephone No.: 766-6487

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By: [signature] (Signature of representative or person filing charge) — An Individual (Title, if any)

Address: 1401 Courtview Towers, 201 N. Pine St., Florence, Ala. 766-6487 (Telephone number) — 2-26-76 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 887-573

EXHIBIT E

BEST COPY AVAILABLE

EXHIBIT F

[27]

[dated March 26, 1976]

• • • • •

COMPLAINT AND NOTICE OF HEARING

It having been charged by Gene E. Newton, an individual, that Robbins Tire and Rubber Company, herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Acting Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1.

Copies of the charge and amended charge, filed on February 4, 1976, and March 3, 1976, respectively, were served upon Respondent by registered mail on February 4, 1976, and March 3, 1976, respectively.

2.

Respondent is, and has been at all times material herein, an Alabama corporation with an office and places of business located at Muscle Shoals City, Alabama, and Tuscumbia, Alabama, where it is engaged in the manufacture of rubber products.

3.

Respondent, during the past calendar year, which period is representative of all times material herein, sold and shipped finished products valued in excess of $50,000

directly to customers located outside the State of Alabama.

[28]

4.

Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

5.

Aluminum Workers International Union, AFL-CIO (herein called the Union), is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

The following-named individuals, occupying the positions set opposite their respective names, are, and have been at all times material herein, agents of Respondent and supervisors within the meaning of Section 2(11) of the Act:

James J. Borden	—	First Shift Foreman in Plant #1
James J. Cooley	—	Third Shift Cove Base Dept. Supervisor
Hollis Collins	—	First Shift Curing Tube Dept. Supervisor
Robert Edward Crittenden	—	Third Shift Production Belt Supervisor
William G. Daniel	—	Second Shift Supervisor in Plant #1
Tommy Dickens	—	Second Shift Mill Room Supervisor
Thomas Ellett	—	Second Shift Lap Splicing Dept. Supervisor
Billy Ray Irons	—	Assistant Personnel Manager

Leonard McCormick	—	Second Shift Cove Base Dept. Supervisor
Harry Meadows	—	Superintendent of the Mill Room, Cove Base Dept. and Receiving Dept.
Michael Palmer	—	Lap Splice Department Supervisor
Donald Pennington	—	Packing Department Supervisor
Sam Styles	—	First Shift Cold Tread Rubber Department Supervisor
Donald Tyne	—	Supervisor
Deek Wann	—	Vice President of Production

[29]

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in and about the vicinity of its Plant #1, interrogated its employees concerning their union membership, activities and desires, and the union membership, activities and desires of other employees:

Lap Splice Dept. Supervisor Michael Palmer	—	August 19, 1975, and September 18, 1975
Supervisor Donald Tyne	—	August 20, 1975
Curing Tube Dept. Supervisor Hollis Collins	—	September 2, 1975
Packing Department Supervisor Donald Pennington	—	September 16, 1975
Lap Splice Dept. Supervisor Thomas Ellet	—	October 2, 1975
Second Shift Supervisor in Plant #1 William G. Daniel	—	October 7, 1975

8.

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective

names, in and about the vicinity of its Plant #2, interrogated its employees concerning their union membership, activities and desires and the union membership, activities and desires of other employees.

Cove Base Dept. Supervisor James J. Cooley	—	September 22, 1975 September 29, 1975
Superintendent Harry Meadows	—	September 25, 1975 October 2, 1975
Mill Room Supervisor Tommy Dickens	—	September 25, 1975
Vice President Deek Wann	—	October 8, 1975
Assistant Personnel Manager Billy Ray Irons	—	October 8, 1975

[30]

9.

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in and about the vicinity of its Plant #1, promised its employees an increased Christmas bonus if the employees rejected the Union as their collective bargaining agent:

Plant #1 Foreman James J. Borden	—	September 25, 1975
Cold Tread Rubber Department Supervisor Sam Styles	—	September 25, 1975 September 29, 1975

10.

Respondent, by its supervisor and agent, Cove Base Department Supervisor Leonard McCormick, on or about October 2, 1975, in and about the vicinity of its Plant #2, promised its employees a larger Christmas bonus if the employees rejected the Union as their collective bargaining agent.

11.

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in and about the vicinity of its Plant #2, threatened its employees that the plant would close if the Union were successful in its organizational campaign:

Lap Splice Dept. Supervisor Thomas Ellett	—	September 25, 1975
Vice President Deek Wann	—	October 3, 1975

12.

Respondent, by its supervisor and agent, Assistant Personnel Manager Billy Ray Irons, on or about October 7, 1975, in and about the vicinity of its Plant #2, threatened its employees with reprisal by telling its employees if they voted for the Union, the Employer would never do anything else for them.

13.

Respondent, by its supervisor and agent, Curing Tube Department Supervisor Hollis Collins, on or about September 2, 1975, in and about the

[31]

vicinity of its Plant #1; on or about September 9, 1975, in and about the vicinity of an employee's home in Russellville, Alabama; and on or about October 2, 1975, in and about the vicinity of its Plant #1 and in telephone conversations, threatened its employees with discharge if they engaged in activities on behalf of the Union.

14.

Respondent, by its supervisor and agent, Vice President Deek Wann, on or about September 25, 1975, in and about the vicinity of its Plant #1, threatened its employees that it would be futile for the employees to engage in activities on behalf of the Union by stating that the Union could not make Respondent do anything it did not want to do.

15.

Respondent, by its supervisor and agent, Lap Splice Department Supervisor Thomas Ellett, on or about October 2, 1975, and October 6, 1975, in and about the vicinity of its Plant #1, threatened its employees that it would be futile for the Union to represent the employees since the Respondent would not negotiate with the Union nor give the Union what it wanted.

16.

Respondent, by its supervisor and agent, Superintendent Harry Meadows, on or about September 25, 1975, in and about the vicinity of its Plant #2, threatened its employees that it would not hire individuals who supported the Union.

17.

Respondent, by its supervisor and agent, Vice President Deek Wann, on or about October 3, 1975, in and about the vicinity of its Plant #1, threatened its employees that it would not employ individuals who supported the Union.

[32]

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in and about the vicinity of its Plant #1, threatened its employees with the loss of their Christmas bonus if the Union were selected as their collective bargaining agent:

Lap Splice Department Supervisor Michael Palmer	—	August 19, 1975
Supervisor Donald Tyne	—	August 20, 1975
Cold Tread Rubber Department Supervisor Sam Styles	—	September 25, 1975
Lap Splice Department Supervisor Thomas Ellett	—	September 29, 1975
Production Belt Supervisor Roger Crittenden	—	September 30, 1975
Vice President Deek Wann	—	October 3, 1975

19.

Respondent, by its supervisor and agent, Cove Base Department Supervisor James J. Cooley, on or about October 8, 1975, in and about the vicinity of its Plant #2, threatened its employees with the loss of bonuses if the Union were selected as their collective bargaining agent.

20.

Respondent, by its following-named supervisors and agents, on or about the dates set opposite their respective names, in and about the vicinity of its Plant #1, physically removed union insignia being worn by its employees:

Lap Splice Department Supervisor Michael Palmer	—	September 18, 1975
Lap Splice Department Supervisor Thomas Ellett	—	September 18, 1975
Packing Department Supervisor Donald Pennington	—	September 25, 1975

21.

Respondent, by its supervisor and agent, Lap Splice Department Supervisor Michael Palmer, on or about October 10, 1975, in and about

[33]

the vicinity of its Plant #1, prohibited its employees from talking about the Union at any time.

22.

The acts of Respondent alleged in paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 27th day of April, 1976, at 10:00 a.m., Central Daylight Time, and consecutive days thereafter until concluded, in the Colbert County Courthouse, Tuscumbia, Alabama, a hearing will

be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings held before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to said complaint within 10 days from the service thereof and that unless it does so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Atlanta, Georgia, this 26th day of March, 1976.

Gilbert Cohen, Acting Regional Director
National Labor Relations Board
730 Peachtree Street, N.E., Room 701
Atlanta, Georgia 30308

EXHIBIT G

[34]

* * * * *

ANSWER

COMES NOW Robbins Tire and Rubber Company, Respondent here, and files pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, this its Answer to the March 26, 1976 Complaint of the Acting Regional Director. In support hereof, Respondent answers as follows:

1.

Paragraphs 1, 2, 3, 4, 5, 6, of the Complaint are admitted.

2.

Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 of the Complaint are denied.

WHEREFORE having fully answered this 31st day of March, 1976, Respondent respectfully moves the Complaint be dismissed in its entirety.

Respectfully submitted,

Robbins Tire and Rubber Company

By: _____
WILLIAM M. EARNEST,
Of Counsel

ELARBEE, CLARK & PAUL
750 Coastal States Building
Atlanta, Georgia 30303
(404) 688-8000

EXHIBIT H

[35]

CERTIFICATE OF SERVICE

[36]

LETTERHEAD

[March 31, 1976]

HAND DELIVERED

Mr. Gilbert Cohen,
Acting Regional Director
National Labor Relations Board
Region 10
730 Peachtree Street, N.E.
Suite 701
Atlanta, Georgia 30308

Re: Robbins Tire and Rubber Company
Cases Nos. 10-CA-11762 and 10-RC-10410

. . . . . .

Request for Records Under The Provisions
Of The Freedom Of Information Act

Dear Mr. Cohen:

The Answer to the March 26, 1976 Complaint and Notice of Hearing has been filed this date with your office. We are also in receipt of your office's February 11, 1976 Report on Challenged Ballots and Objections which recommends that a hearing be conducted to resolve credibility issues. The alleged incidents set forth in the Report on Challenged Ballots and Objections are co-extensive with portions of the allegations of the Complaint.

Pursuant to the requirements of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), and the Rules

and Regulations of the National Labor Relations Board, as amended, 29 C.F.R. § 102.117(c)(1), it is hereby requested that copies of all written statements, signed or unsigned, contained in the Board's case files with respect to those witnesses which

[37]

the Board will call to testify at the hearing(s) in the above-referenced cases be made available for inspection and copying by the undersigned at least seven (7) days prior to the start of said hearing(s). The hearing in Case No. 10-CA-11762 is scheduled to begin on April 27, 1976.

Please be advised, pursuant to 29 C.F.R. § 102.117(c)(2)(iv)(b), that the undersigned agrees to assume full financial liability for all charges which may be incurred in responding to this request.

As this request has been hand delivered this date and the hearing date is only a matter of weeks away, we ask that you respond as soon as possible, in accordance with the requirements of the Freedom of Information Act, 5 U.S.C. § 552(a)(6)(A)(i), and the Board's Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(i).

Very truly yours,

WILLIAM M. EARNEST
Of Counsel to
Robbins Tire and Rubber Company

WME:mp

EXHIBIT I

[38]

[April 2, 1976]

LETTERHEAD

William M. Earnest, Attorney
Elarbee, Clark & Paul
750 Coastal States Building
Atlanta, Georgia 30303

Dear Mr. Earnest:

Your letter dated March 31, 1976, requesting certain information under the Freedom of Information Act, 5 U.S.C. Sec. 552, *et seq.*, was received by this office on March 31, 1976.

Your request for "all written statements, signed or unsigned, contained in the Board's case files with respect to those witnesses which the Board will call to testify at the hearing(s) in the above-referenced cases . . ." must be denied. Such records are privileged from disclosure by Exemptions 5 and 7(A), (C) and (D) of Section 552(b) of the Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. Section 552(b)5, 7(A), 7(C) and 7(D). Exemption 5 of the FOIA exempts disclosure of the information you seek. That exemption incorporates the privileges which the Government enjoys under the relevant statutory and case law in the discovery context. *Renegotiation Board* v. *Gruman Aircraft Corp.*, 421 U.S. 168, 184 (1975). Those privileges include the "executive privilege" for predecisional memoranda which reflect the Agency's deliberative process, and the "attorney work product privilege." See *N.L.R.B.* v. *Sears, Roebuck and Co.*, 421 U.S. 132, 150-154 (1975). When an investigator takes an affidavit or statement in an unfair labor practice investigation, it is done in anticipation of trial and must be viewed as attorney work product, which is not normally discoverable. *Hickman* v. *Taylor*, 329 U.S. 495, 512-513 (1947). Moreover, even if the results of the investigation do not warrant a finding that an unfair labor practice has been committed, the affidavits would still be

used by the Regional Director in the administrative deliberations leading to the determination of whether or not issuance of a complaint is warranted. See *Brockway* v. *Department of the Air Force*, 518 F.2d 1184 (C.A. 8, 1975).

[39]

Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the investigation of charges, much information, including statements and affidavits, is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the FOIA. In the administration of the Act, the agency must be able to obtain in its investigations all potentially relevant information. The protection of the identity of individuals and the substance of the information they submit in the agency's investigation is an important means of assuring the agency's continuing ability to obtain such relevant information. Individuals giving statements in the investigation are given express assurance that their statements will not be disclosed unless and until the individual is called as a witness in a formal proceeding, as provided for in Section 102.118(b) of the Board's Rules and Regulations. If the agency were forced to disclose statements submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation of individuals, hinder obtaining information from all potential sources and, consequently, substantially interfere with enforcement proceedings. Cf. *N.L.R.B.* v. *Scrivener*, 405 U.S. 117.

The requested statements are also within Exemption 7(D) because their disclosure would reveal the identity of a confidential source, i.e., an individual who provides information under an express assurance of confidentiality or in circumstances from which such assurances can reasonably be inferred. As noted above, individuals giving statements to the agency during the investigation are advised and assured that their statements will remain confidential, except as provided by Section 102.118 of the Board's Rules and Regulations. This policy of protecting confidential sources of information has been consistently followed in the administration of the Act and is well known to those persons dealing with this agency. Accordingly, since the individuals furnishing statements in the instant cases are confidential sources, Exemption 7(D) authorizes our refusal to identify the individuals.

Also, since these statements contain matter personal to the individuals who supplied them and to individuals referred to in the statements,

[40]

they are exempt from disclosure under Exemption 7(C). This exemption protects the personal privacy of individuals submitting statements and individuals named therein, and requires the balancing of their interest of privacy against the interest of a requesting party in disclosure. You have submitted no consideration which would, I find, overcome the privacy rights of individuals and therefore, their right of privacy must prevail.

For the reasons set forth above, your request for the statements must be denied. See *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, (D.C.P.R.); *Clement Brothers Company* v. *N.L.R.B.*, 282 F. Supp. 540, (D.C. Ga.); affmd. *N.L.R.B.* v. *Clement Brothers Co.*, 407 F.2d 1027 (C.A. 5). See also, *Wellman Industries, Inc.* v. *N.L.R.B.*, 490 F.2d 427 (C.A. 4), cert. den., 95 S. Ct. 61, (Oct. 15, 1974).

Further, deletion of names from these records would not preserve the interest recognized by Exemptions 7(A), (C) and (D) since disclosure of the material contained therein would, itself, constitute invasion of personal privacy, reveal confidential sources, and consequently, interfere with enforcement proceedings under the considerations set forth above. Deletion of portions sufficient to prevent an unwarranted invasion of personal privacy or prevent disclosure of a confidential source would result in a record

so fragmented as to be incoherent and not responsive to your request.

The undersigned is responsible for the determination that the records you have requested are privileged from disclosure under the Freedom of Information Act. You may obtain a review of that determination under the provisions of Section 102.117(c)(2)(ii) of the Board's Rules and Regulations by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D.C. 20570, within 20 days (excluding Saturdays, Sundays and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Sincerely yours,

GILBERT COHEN
Acting Regional Director

EXHIBIT J

[41]

April 8, 1976

CERTIFIED MAIL NO. 945987
AIR MAIL/SPECIAL DELIVERY

The Honorable John S. Irving
General Counsel
National Labor Relation Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: Robbins Tire and Rubber Company
Case Nos. 10-CA-11762 and 10-RC-10410

.....

Appeal from Denial of Request For Records Under The Provisions of The Freedom of Information Act

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Dear Sir:

Pursuant to 29 C.F.R. § 107.117(c)(2)(ii) of the Board's Rules and Regulations, as amended, the undersigned hereby appeals from the denial by the Acting Regional Director for Region 10, dated April 2, 1976, of the undersigned's request for inspection and copying of documents. Copies of the request and denial are annexed hereto.

The basis for this appeal is that the Acting Regional Director has erroneously relied on the permissive exemptions of 5 U.S.C. § 552(b)(5) and (7)(A)(C) and (D) to deny disclosure of the items specified in our request. None of the materials sought falls within those narrow statutory exemptions. Furthermore, the Acting Regional Director has failed to specifically identify the documents in question, describe their contents, and demonstrate why, as to each item denied, a

[42]

specific exemption applies. It is the Government's burden to prove that a specific document falls within one or more exemption. This burden has not been met. It is not met by a broad assertion that a general type of document automatically qualifies for exemptions under one or more of the provisions of § 552(b).

The Acting Regional Director has failed to show why sanitized copies or portions of documents cannot be made available so as to comply with the Freedom of Information Act disclosure requirements, while protecting any asserted interest in confidentiality. He merely asserts that providing a portion of the statements requested "would result in a record so fragmented as to be incoherent and not responsive to your request." It is not for the Acting Regional Director to determine that portions of records which he admits are disclosable should not be made available because they would be, in his opinion, fragmented or incoherent. It is his burden to provide these portions.

In addition the request for inspection and copying of documents related *only* to written statements of those witnesses which the Board will call to testify at the April 27 hearing and were requested to be produced at least seven (7) days before the hearing. There is no breach of confidentiality as the witness will testify at the hearing and the written statements must also be produced then upon proper request. There is no interference with the Board's investigatory processes as complaint has already issued and the investigation has been concluded.

To the extent that you may believe that any of these documents are within the exemptions of 5 U.S.C. § 552 (b), we request that you nevertheless waive the exemptions pursuant to 29 U.S.C. § 102.118, to assure that our client, Robbins Tire and Rubber Company, is not deprived of its rights before the Agency in NLRB Cases Nos. 10-CA-11762 and 10-RC-10410.

Please be advised that we continue to agree to assume full financial liability for the direct cost of document search and duplication in compliance with the Freedom

of Information Act, and as required by 29 C.F.R. § 102.-177(c)(2)(iv)(B).

[43]

Thank you for your prompt attention to this matter.

Very truly yours,

WILLIAM M. EARNEST
Of Counsel to
Robbins Tire and Rubber Company

WME:mp

Enclosures

cc: Mr. Gilbert Cohen
Acting Regional Director
National Labor Relations Board
Region 10
Suite 701, 730 Peachtree Street, N.E.
Atlanta, Georgia 30308

bcc: Mr. Poncet Davis, Jr.
Mr. Wilmer E. Maddox

[44]

[filed April 15, 1976]

* * * * *

APPLICATION FOR TEMPORARY RESTRAINING ORDER

COMES NOW the Plaintiff, ROBBINS TIRE AND RUBBER COMPANY, acting by and through its attorneys, and, pursuant to Rule 65 of the Federal Rules of Civil Procedure applies to this Court for a temporary restraining order enjoining the Defendant herein from holding any hearing in connection with NLRB Case Nos. 10-RC-10410 and 10-CA-11762 except in accordance with the Order of this Court. In support hereof, Plaintiff respectfully shows:

1. Plaintiff has requested under the provisions of the Freedom of Information Act, as amended, 5 U.S.C. § 552 (a), and under the Rules and Regulations of the National Labor Relations Board, as amended, 29 C.F.R. § 102.117 (c) (1) "copies of all written statements, signed or unsigned, contained in the Board's case files with respect to those witnesses which the Board will call to testify at the hearing(s) in the above-referenced cases be made available for inspection and copying by the undersigned at least seven (7) days prior to the start of said hearing(s)."

2. The Defendant has improperly rejected Plaintiff's request.

[45]

3. Plaintiff is entitled to the requested information. See supporting Memorandum Brief.

4. The hearing for which the above information is sought is presently scheduled for April 27, 1976. If the Defendant does not produce the requested information a reasonable time prior to the April 27, 1976 hearing then Plaintiff will be wrongfully precluded from preparing its defense in the hearing and irreparably injured. Plaintiff's action will be moot if Defendant is allowed to proceed with the hearing without producing the requested information.

5. The prejudice which would result to Plaintiff if the hearing proceeded without the production of the requested information far outweighs any effect on Defendant caused by a rescheduling of the hearing until such time as this Court rules on the merits of this action.

WHEREFORE, Plaintiff requests this Court to issue a Temporary Restraining Order and in due course a Preliminary Injunction pending the determination of this action.

Respectfully submitted,

POELLNITZ, COX, ROBISON, McBURNEY & JONES

By: /s/ Poellnitz
ELARBEE, CLARK & PAUL

By: /s/ William M. Earnest
Attorneys for Plaintiff
ELARBEE, CLARK & PAUL
750 Coastal States Building
Atlanta, Georgia 30303
(404) 688-8000

POELLNITZ, COX, ROBISON, McBURNEY & JONES
P.O. Box 876
Florence, Alabama 35630
(202) 764-0821

[46]

[filed April 15, 1976]

* * * * *

AFFIDAVIT

I, William M. Earnest, being counsel of record for Plaintiff in the action of ROBBINS TIRE AND RUBBER COMPANY against the NATIONAL LABOR RELATIONS BOARD states as follows:

On Friday, April 9, 1976, at 5:20 p.m. EST, I telephoned Ms. Abigail Cooley, Defendant NLRB's Assistant General Counsel for Special Litigation and advised her I represented Robbins Tire and Rubber Company. I further advised her we had in connection with the forthcoming hearing on April 27, 1976 requested copies of statements of those persons who were to be witnesses at the hearing and that such statements be produced at least seven (7) days prior to the start of the hearing. I informed Ms. Cooley our request had been denied by the Region and that we had appealed to NLRB General Counsel Irving but had no response yet. I told her it was our intention to file a Complaint in the District Court to obtain such information and wondered, because of the closeness of the hearing, if it would be necessary to seek a restraining order with regard to the hearing or if the NLRB would reschedule the hearing until a determination of the merits could be made by the Court. She said the NLRB would not agree to a rescheduled hearing. I told her that I would then consult with my client but that we would be filing a Complaint next week. I told her I would notify both her office and the local NLRB Regional Office of the filing of the Complaint. She said she would not be coming down to handle the matter but would get someone out of the local (Atlanta, Georgia) Regional Office.

At 3:01 P.M. EST, Monday, April 12, 1976, I telephoned Acting Regional Director Gilbert Cohen and advised him that we were going to file a Complaint in the United States District Court for the Northern District of

Alabama seeking the statements requested in my letter to him. He acknowledged his receipt and familiarity with my letter. I told him because of the closeness of the April 27, 1976 hearing we would be seeking a restraining order as to the holding of the hearing. I told him of the above call to Ms. Cooley and that I would call NLRB General Counsel Irving. I advised him of the 10:30 A.M. hearing on April 15, 1976 in this Court.

I then called at 3:24 P.M. EST NLRB General Counsel John Irving's office and was referred to attorney Bill Wachter who said he would be filling Ms. Cooley's position effective Monday, April 19, 1976. I told Mr. Wachter of my appeal to General Counsel Irving and read to him the request. I asked him if it still was the General Counsel's policy to deny such requests and he said that it was. I then told him that a Complaint on behalf of Robbins Tire and Rubber Company would be filed in the United States District Court seeking this information and that because of the nearness of the April 27, 1976 hearing we would also be seeking a restraining order.

[47]

I told him a hearing would be held at 10:30 A.M. CST in the District Court in Birmingham regarding the above.

I have read the above affidavit and swear it is true to the best of my knowledge and belief.

/s/ William M. Earnest
WILLIAM M. EARNEST
Of Counsel to Plaintiff,
Robbins Tire and
Rubber Company

Subscribed and sworn to before me
this 12th day of April, 1976
/s/ Jimmie S. Love
Notary Public

[48]

[filed April 15, 1976]

* * * * *

MOTION TO DISMISS COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The National Labor Relations Board, defendant herein, moves to dismiss the complaint and request for injunctive relief in the above-captioned case under Rule 12(b), Federal Rules of Civil Procedure, on the following grounds:

1. This Court lacks jurisdiction over the subject matter of the action;
2. The complaint and request for injunctive relief fail to state a claim upon which relief can be granted.

Alternatively, defendant moves that summary judgment be granted under Rules 12(c) and 56, Federal Rules of Civil Procedure, on the basis of the complaint and exhibits attached thereto.

WHEREFORE, defendant prays that the complaint and request for injunctive relief be dismissed, or, in the alternative, that summary judgment be entered in their favor.

Respectfully submitted,

By /s/ William E. Caldwell
WILLIAM E. CALDWELL
Acting Regional Attorney
National Labor Relations Board
Region 10
730 Peachtree Street, N.E.,
Room 701
Atlanta, Georgia 30308
Telephone: (404) 526-5361

Dated at Atlanta, Georgia
this 15th day of April, 1976.

---

[49]

[filed April 15, 1976]

* * * *

OPPOSITION TO COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF

In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 51 (1938), the Supreme Court determined that district courts have no authority to interfere with the Board or its agents during the course of an unfair labor practice proceedings. See also, *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler, et al.*, 303 U.S. 54 (1938). A major premise of this holding rested on the doctrine requiring the exhaustion of administrative remedies. Those remedies include utilization of the statutory review procedures available upon entry of the agency's final decision and order as the exclusive forum for challenging interlocutory rulings on both substantive and procedural matters. See, *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46-47 (1936). It is now well established that the statutory review procedures set forth in Section 10(e) and (f) of the National Labor Relations Act are the exclusive procedures for assertions, such as those made here, of deprivation of constitutional and statutory rights. See, e.g., *Sears, Roebuck & Co.* v. *N.L.R.B.*, 433 F.2d 210, 211 (C.A. 6, 1970); *McClains Industries, Inc.* v. *N.L.R.B.*, 521 F.2d 596 (C.A. 6, 1974); *Bokat* v. *Tidewater Equipment Co.*, 363 F.2d 677 (C.A. 5, 1966); *United Aircraft Corp.* v. *McCulloch*, 365 F.2d 960, 961 (C.A.D.C., 1960), cert. denied, 380 U.S. 910. This review is

[50]

also the exclusive procedure for assertions of prejudice in preparing a defense because of refusal of the Board to permit discovery, including assertions that such refusal constitutes an improper withholding of records under the Administrative Procedure Act. See, e.g., *Vapor Blast Mfg. Co.* v. *Madden*, 280 F.2d 205, 209 (C.A. 7, 1960), cert. denied, 364 U.S. 910; *Sears, Roebuck & Co.* v.

N.L.R.B., *supra*; *McClain Industries, Inc.* v. *N.L.R.B.*, *supra*; *Polymers, Inc.* v. *N.L.R.B.*, 414 F.2d 999, 1005-1006 (C.A. 2, 1969), cert. denied, 396 U.S. 1010; *Intertype Co.* v. *Penello*, 269 F. Supp. 573, 576 (D.C.N.D. Va. 1967). For instance, in *Vapor Blast Mfg. Co.* v. *Madden*, *supra*, a case very similar to the instant one, the employer subject to unfair labor practice proceedings before the Board requested the district court to issue an order enjoining Board hearings and a declaratory judgment declaring the Company's right to inspect employee affidavits obtained by Board agents during the course of their investigation. The Court refused to grant the relief requested stating, inter alia (280 F.2d at 208, 209):

> The review provisions of the Act, 29 U.S.C.A. Sec. 160(e) and (f), provide adequate and full opportunity for the Company to raise the contentions it tendered in its complaint in the district court. Under the provisions of Section 10(e) of the Act, in an enforcement proceeding the Company may put in issue the question of whether it was deprived of its rights to procedural process by the Board's action to suppressing the documents in question.
>
> . . . [M]erely raising a constitutional issue in its complaint for declaratory judgment, when full appellate review of the administrative proceedings is available and in the absence of any extenuating circumstances, is insufficient to give the district court jurisdiction over the subject matter in the fact of the well-established doctrine of exhaustion of administrative remedies . . .

Accordingly, it is clear that this court has no authority to enjoin the Board's proceedings herein, or to review the actions of the General Counsel or his agents during the course of those proceedings.

[51]

The Freedom of Information Act (5 U.S.C. Sec. 552, *et seq.*, as amended, 88 Stat. 1563 (1974) does not alter

this long settled rule. Plaintiff has not exhausted its administrative remedies before the Board. By letter dated April 8, 1976, Plaintiff appealed to the General Counsel the Acting Regional Director's refusal to furnish the documents requested. The Act provides that the General Counsel make a determination with respect to any appeal within twenty working days after the receipt of such appeal. The General Counsel has not yet ruled on Plaintiff's appeal. Thus, Plaintiff's complaint herein is premature and fails to state a claim upon which relief can be granted under the judicial review provisions of the Freedom of Information Act. See *Satra Belarus, Inc.* v. *N.L.R.B.*, —— F. Supp. ——, 91 LRRM 2555 (D.C.E.D. Wisc. 2/18/76).[1]

Whether the General Counsel will grant or deny Plaintiff's appeal is unknown and Counsel herein does not intend to imply what that decision will be. However, in *Title Guarantee Co.* v. *N.L.R.B.*, —— F.2d —— (C.A. 2, 4/12/76) the Court, holding that statements of witnesses were exempt from disclosure under Exemption 7(A) of the Freedom of Information Act, stated:

> . . . We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a backdoor amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. Sec. 160(b) of the National Labor Relations Act, 29 U.S.C. Sec. 160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. 14] It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended . . .
>
> . . . In light of the delicate relationship which exists between employer and employee, we think that

[1] This Court on October 17, 1975 dismsised a complaint in *Federal Mogul*, Civil No. CA75H1945J, filed by a respondent in a Board proceeding under identical circumstances.

> Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for
>
> [52]
>
> discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery. In short, while we have been impressed with the appellee's grasp of the FOIA amendment and almost persuaded by its argumentation and that of the district court, we are forced to conclude that statements of employees, and their representatives, obtained in connection with unfair labor practice enforcement proceedings are not subject to disclosure as a result of Exemption 7(A) . . .

As Senator Hart, the sponsor of the recent amendments to the Information Act, pointed out, Exemption 7 of that Act, as originally enacted and as amended, was intended "to prevent harm to the government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." 120 Cong. Rec. S9329 (daily ed., May 30, 1974). In *Sears, Roebuck & Co.* v. *N.L.R.B.*, 473 F.2d 91 (C.A.D.C., 1972), cert. denied, 415 U.S. 950, the Court of Appeals for the District of Columbia summarily reversed an order of the district court, Corcoran, J.) enjoining the Board from processing an unfair labor practice proceeding pending compliance with the Information Act. In so doing, the Court stated, in language clearly applicable here (473 F.2d at 93):

> . . . While *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 1A LRRM 575 (1938), cannot be taken as mandating that such intervention is never warranted, it still has vitality as indicating that it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. A cogent showing

> of irreparable harm is an indispensable condition of such intervention.
>
> Irreparable harm cannot be established by a mere reliance on the burden of submitting to agency hearings. This is a risk of litigation that is inherent in society, and not the type of injury to justify judicial intervention. E.g., *Myers*, *supra*, at 51-52.
>
> In the case at bar we do not have a cogent showing, indeed we do not see a substantial showing, of how Sears will be irreparably harmed in its participation in the unfair labor practice charge without the Advice and Appeals memoranda whose disclosure is still under judicial consideration . . .
>
> [53]
>
> It may be that Sears will be held entitled to the documents under the Information Act, and it may be that is possession of those documents will be a convenience, indeed a significant help, in its litigating stance. But those considerations are of a different order from the kind of irreparable injury required to interrupt an administrative proceeding. Should Sears' claim to the memoranda be upheld on appeal and should it appear that there was significant adverse impact on Sears in the unfair labor practice charge proceedings because it was denied timely disclosure, an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order.

After the Supreme Court denied the Company's petition for writ of certiorari in this case, it had occasion to consider the merits of Sears' claims under the Freedom of Information Act, and observed:

> . . . Sears appeal—without benefit of the documents sought—was ultimately successful, a complaint was filed with the Board, and hearings were scheduled to commence on the complaint on November 9, 1971.

> Proceedings before the Board were delayed for a time by a stay issued by the District Court, later reversed by the Court of Appeals, *Sears, Roebuck & Co.* v. *N.L.R.B.*, 153 U.S. App. D.C. 380, 473 F.2d 91 (1973), cert. denied, 415 U.S. 950 (1974) . . .
>
> Sears' rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. *E.P.A.* v. *Mink*, 410 U.S. 73, 79, 92 (1973); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

N.L.R.B. v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975).

Thereafter, in a case virtually identical to the instant one, the United States District Court for the District of Columbia denied plaintiff company's request for a mandatory injunction compelling the production of statements in sufficient time prior to hearing to permit their use by the company defendant in an unfair labor practice proceeding, observing that plaintiff had "failed to establish that it [would] suffer irreparable injury absent the issuance of such an injunction,

[54]

as required by *N.L.R.B.* v. *Sears, Roebuck & Co.* . . ." *General Cigar Co., Inc.* v. *Nash*, —— F. Supp. ——, 89 LRRM 2863 (D.C.D.C., 1975).

And finally, the Supreme Court held in *Renegotiation Board* v. *Bannercraft Clothing Co., Inc., et al.*, 415 U.S. 1 (1974) that the court below erred in enjoining proceedings before the Renegotiation Board pending resolution of plaintiff's request for production of documents under the Freedom of Information Act. The reasons for so holding were as follows: (1) prior to the enactment of the Information Act, the Supreme Court had consistently held that such proceedings were not to be enjoined prior to the

exhaustion of the administrative process (415 U.S. at 20-22); (2) "[s]eeking injunctive relief during the pendency of such proceedings encourages delay through resort to preliminary litigation over an FOIA claim" (415 U.S. at 23); (3) the decision of the administrative agency does not impose any obligation on the parties until termination of further court proceedings, and thus the injury suffered, absent an injunction, is simply that of being unsuccessful in the initial administrative stages and the litigation expense, which does not constitute irreparable injury (415 U.S. at 23-24);[9] and (4) "Interference with the agency proceeding opens the way to the use of the FOIA as a tool of discovery, see *Sears, Roebuck & Co.* v. *N.L.R.B.*, 433 F.2d 210, 211 (C.A. 6, 1970), over and beyond that provided by the regulations issued by the Renegotiation Board for its proceedings . . . Discovery for litigation purposes is not an expressly indicated purpose of the Act." (415 U.S. at 24). We submit that all of the above criteria are equally

[55]

applicable in Labor Board proceedings. Thus, as shown above, the courts, including the Supreme Court, have always held that Board unfair labor practice proceedings should not be enjoined prior to the exhaustion of the administrative process. Seeking injunctive relief during Labor Board proceedings encourages delay just as much as it does in Renegotiation Board proceedings. Plaintiff has an adequate judicial remedy under the Act, and will at most suffer litigation expense in pursuing it, which

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[9] As the Court stated (*ibid*):

> "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52; Jaffe, Judicial Control of Administrative Action, 429 (1965). Without a clear showing of irreparable injury, see *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 104 U.S. App. D.C. 106, 111, 259 F.2d 921, 926 (1958), failure to exhaust administrative remedies serves as a bar to judicial intervention into the agency process. *Myers, supra, Sears, Roebuck & Co.* v. *N.L.R.B.*, —— U.S. App. D.C. ——, ——, 473 F.2d 91, 93 (1973) [cert. denied, 415 U.S. 950]."

expense does not warrant injunctive relief. And finally, interference with the Board's proceedings would permit plaintiff to use the Information Act as a tool of discovery over and beyond that provided in the Board's court sanctioned rules. Thus, it is evident that *Bannercraft* is controlling here, and that plaintiff is not entitled to injunctive relief pending litigation of its Information Act claim. See, *Title Gurantee Co., supra; Sears, Roebuck & Co.* v. *N.L.R.B., supra; General Cigar Co., Inc.* v. *Nash, supra.*

CONCLUSION

For all the foregoing reasons, the Board respectfully submits that its motion to dismiss complaint and request for injunctive relief, or, in the alternative, for summary judgment, should be granted.

Respectfully submitted,

JOHN S. IRVING, General Counsel,
ELLIOTT MOORE, Deputy Associate
General Counsel,
ABIGAIL COOLEY, Assistant General
Counsel for Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221

By /s/ William E. Caldwell
WILLIAM E. CALDWELL, Acting
Regional Attorney, Region 10
National Labor Relations Board
730 Peachtree Street, N.E. Room 701
Atlanta, Georgia 30308
Telephone: (404) 526-5361

Dated at Atlanta, Georgia
this 15th day of April, 1976.

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[56]

Thursday April 15th 1976

JUDGMENT ON DECISION BY THE COURT CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE NORTHWESTERN DIVISION
OF THE NORTHERN DISTRICT OF ALABAMA

Civil Action File No. CA-76-H-528-NW

ROBBINS TIRE AND RUBBER COMPANY

vs.

NATIONAL LABOR RELATIONS BOARD

JUDGMENT

This action came on for (hearing) on April 15, 1976, before the Court, Honorable James H. Hancock, United States District Judge, presiding, and the issues having been duly (heard)

It is Ordered and Adjudged that this matter is taken under advisement.

JAMES E. VANDEGRIFT, Clerk

By: /s/ Lester H. Jones
Deputy Clerk

FILED:

April 15, 1976
James E. Vandegrift, Clerk

By: /s Lester H. Jones
Deputy Clerk
Birmingham, Alabama
John Weaver, reporting
Time: 10:30-11:45

[57]

[filed April 16, 1976]

* * * * *

MEMORANDUM OF DECISION

This cause came on for hearing on April 15, 1976, on the request by plaintiff for a preliminary injunction and on the motion by defendant to dismiss, or, in the alternative, for summary judgment. Since all parties agreed that the issues presented are legal, not factual, the court entered an oral order under Rule 65 of the Federal Rules of Civil Procedure directing that the trial of this action on the merits be advanced and consolidated with the hearing on April 15, 1976, on the application for a preliminary injunction.

The following is a brief summary of the facts which are not in dispute. In connection with its investigation of a contested election and its investigation of an unfair labor practice charge, defendant secured certain affidavits and/or written statements of various individuals. On March 26, 1976, the Board set down for hearing on April 27, 1976, the complaint predicated upon the unfair labor practice charge. April 27, 1976 is also the date of the hearing concerning issues raised by the election contest.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a), and defendant's rules and regulations, 29 C.F.R. § 102.117(c)(1), plaintiff on March 31, 1976, in writing requested of the Board's Acting Regional Director:

[58]

> "that copies of all written statements, signed or unsigned, contained in the Board's case files *with respect to those witnesses which the Board will call to testify* at the hearing(s) in the above-referenced cases be made available for inspection and copying by the undersigned at least seven (7) days prior to the start of said hearing(s)." (Emphasis added)

Plaintiff agreed to assume full financial liability for all charges incurred in responding to the request.

By letter dated April 2, 1976, the Acting Regional Director of the Board denied plaintiff's request, asserting that the statements which were requested were privileged from disclosure by exemptions 5 and 7(A), (C) and (D) of § 552(b) of Title 5 of the United States Code. On April 8, 1976, plaintiff appealed the determination to the Board's General Counsel who has not ruled on such appeal and who is not required so to do prior to the scheduled hearing on April 27, 1976. Thereafter the complaint was filed herein which invoked this court's jurisdiction under 5 U.S.C. § 552(a)(4)(B).

Normally a court will require the exhaustion of administrative remedies prior to entertaining jurisdiction of an action complaining of agency action. But this exhaustion principle is not without its exceptions and exhaustion rests within the sound discretion of the court. See *Ecology Center of Louisiana, Inc.* v. *Coleman*, 515 F.2d 860 (5th Cir. 1975). Here plaintiff has promptly taken all steps available to it to pursue its administrative review, and the court finds that the factors normally to be considered in an exception to the exhaustion principle are in plaintiff's favor here. See *McKart* v. *United States*, 395 U.S. 185 (1969). Thus, for the reasons stated by the court into the record during the oral hearing on April 15, 1976, this court is of the opinion that jurisdiction has been properly invoked under the Freedom of Information Act without plaintiff being required further to exhaust its administrative review. The

[59]

facts in this case are different than those in *Federal-Mogul Corporation* v. *National Labor Relations Board*, CA75-H-1945-J, decided by this court on October 17, 1975. In *Federal-Mogul* plaintiff sought to invoke this court's jurisdiction under somewhat similar circumstances, but plaintiff there had not appealed the decision of the Board's Regional Director to the Board's General Counsel either prior to initiating the action or prior to the hearing on

the requested preliminary injunctive relief. Here plaintiff has promptly done all within its power to secure final agency action.

In its complaint plaintiff essentially seeks two types of relief. First, plaintiff seeks the information it requested of defendant on March 31, 1976, and secondly, plaintiff seeks an injunction against the scheduled April 27, 1976 hearing. With regard to this second request, the court is aware of the reluctance of district courts to enjoin proceedings before the National Labor Relations Board except in those rare and well defined instances where the Board may be engaged in acts which are either contrary to specific prohibitions of the National Labor Relations Act or which are in excess of its delegated powers. Neither situation is presented by the instant case, and while a violation of the Freedom of Information Act may be another exception to the general rule, enjoining proceedings before the Board is not appropriate where other, more normal relief will be sufficient. The court is of the opinion that plaintiff may be adequately protected by required production of information to which it may be entitled under the Freedom of Information Act without the assistance of an injunction directed at the April 27, 1976 hearing, and thus plaintiff will suffer no irreparable injury by the hearing.

[60]

It is important to note that the Board does not claim that there is something unusual about the affidavits or statements or that their is something within them that would cause them to be anything other than an average statement obtained during a routine investigation. The Board's attorney stated during the oral hearing on April 15, 1976, that, for the purposes of deciding this case, the court could assume that the Board's position is predicated simply upon the fact that the statements were obtained in connection with a pending matter. Thus, an *in camera* inspection of the statements will not be necessary.

There is no dispute that plaintiff is entitled to the information it has requested unless defendant can discharge the burden it has of establishing that the information

falls within one of the specific exemptions contained in the Act. Even prior to the 1974 Amendment to the Freedom of Information Act, the Fifth Circuit Court of Appeals had established that the disclosure of material in government files was the rule, not the exception, and that the Act was intended to increase public access to records except under specific, narrowly constructed exemptions. *Stokes* v. *Brennan*, 476 F.2d 699 (5th Cir. 1973). Certainly no less can be said for the Freedom of Information Act following the 1974 Amendment.

The first exemption defendant seeks to assert is the one established by 5 U.S.C. § 552(b)(5) for inter-agency or intra-agency memorandums or letters. The Board does not argue that the statements and affidavits are in the form of "memorandums" or "letters." See *Bellingham Frozen Foods* v. *Henderson*, 91 LRRM 2761 (W.D. Wash. 1976). Neither does the Board urge that the statements and affidavits possess a deliberative, as opposed to factual quality. See *Title Guraantee*

[61]

Company v. *N.L.R.B.*, 90 LRRM 2849 (S.D.N.Y. 1975) [rev'd on other grounds, —— F.2d —— (2nd Cir. 1976)]. And this court is of the opinion that normal, routine affidavits and statements taken from persons not employed by the Board during a typical investigation by the Board are not embraced in the § 552(b)(5) exemption. See *Stokes* v. *Brennan, supra.*

As noted earlier, counsel for the Board acknowledged during the April 15, 1976 hearing that there is nothing unusual about or contained in the affidavits and statements which it declines to supply. Thus in urging an exemption under § 552(b)(7)(C) or § 552(b)(7)(D), the Board must be able to support a position that any statement or affidavit which it holds in connection with an open file is embraced within one of such exemptions. This it cannot do. The Board does not discharge the burden cast upon it in claiming one of such two exemptions simply by showing that the writing sought is in affidavit or statement form taken from a person who will

testify at a forthcoming hearing. See *Bellingham Frozen Foods* v. *Henderson, supra.* This is particularly true where, as here, the only statements or affidavits sought are from persons who will be called to testify at the April 27, 1976 hearing and under the Board's own rules, affidavits and statements of any witness must be supplied immediately after the witness has testified. 29 C.F.R. § 102.117(b)(1).

The final matter to be considered is the one exemption the Board asserts most strongly and the one, if any, to which it may be entitled. 5 U.S.C. § 552(b)(7)(A). Defendant relies primarily upon the recent decision of the Second Circuit Court of Appeals in *Title Guarantee Company* v. *N.L.R.B.*, —— F.2d —— (2nd Cir. 1976). There, Title Guarantee Company had requested copies of *all*

[62]

written statements contained in the Board's file and any such statements subsequently available to the Board. Satisfying the burden of demonstrating that this broad request interferes with the Board's enforcement proceedings (where none of the persons who gave the statements might be called as witnesses and thus where none of the statements might ultimately be supplied to the Company under the Board's own rules) is substantially easier than satisfying the burden the Board bears in the instant case where the *fact* of disclosure of the statements is not the issue but simply the *time* at which the disclosure will be made. The request here is limited only to those statements of persons who will testify and thus the Board will be required by its own rules immediately after the testimony is given to deliver the statements here in issue to plaintiff. 29 C.F.R. § 102.118(b)(1). And the Board has not demonstrated how the delivery to plaintiff several days prior to the scheduled hearing of routine statements or affidavits will interfere with enforcement proceedings of the Board where, in connection with those proceedings, the Board by its own rules will be required to give the statements and affidavits to plaintiff. The court is therefore of the opinion that the defendant should be required to supply the information requested in writing by the

March 31, 1976 letter. An appropriate order will be entered.

DONE this 16th day of April, 1976

/s/ James H. Hancock
United States District Judge

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[63]

[filed April 16, 1976]

* * * * *

ORDER

In accordance with the Memorandum of Decision this day entered, it is hereby ORDERED, ADJUDGED, DECREED and DECLARED that the information sought by plaintiff, i.e., written statements now or hereafter contained in the Board's case filed with respect to those witnesses which the Board will call to testify at any hearing in Cases Nos. 10-CA-11762 and 10-RC-10410, constitutes public information within the meaning of the Freedom of Information Act, as amended, 5 U.S.C. § 552(a), with respect to which plaintiff is entitled to inspection and copying.

It is further ORDERED that the Board shall turn over to the plaintiff copies of the material sought by plaintiff in its letter of March 31, 1976, for inspection and copying on or before April 22, 1976, or, at the election of the Board, on or before a date which is at least five days prior to any hearing where the person making the statement or affidavit will be called as a witness.

It is further ORDERED that costs are taxed against defendants.

DONE this 16th day of April, 1976.

/s/ James H. Hancock
United States District Judge

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[64]

[filed April 22, 1976]

* * * * *

NOTICE OF APPEAL

TO: William M. Earnest
Ellerby, Clark, and Paul
750 Coastal States Building
Atlanta, Georgia 30303

Defendants appeal to the United States Court of Appeals for the Fifth Circuit from the judgment entered on April 16, 1976 in the above-captioned case, directing the defendant to turn over to plaintiff, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended 88 Stat. 1563, *et seq.*, witness statements secured in the investigation of Board Case No. 10-CA-11762, 10-RC-10410, a consolidated unfair labor practice and representation proceedings.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

[65]

By /s/ William Wachter
WILLIAM WACHTER, Acting Assistant
General Counsel for Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221

Dated at Washington, D.C.
this 20th day of April, 1976

Co-Counsel: Aileen A. Armstrong
(Ext. 9001)

—and—

GILBERT COHEN, Regional Attorney
Region 10, N.L.R.B.
Peachtree Building, Suite 701
730 Peachtree Street, N.E.
Atlanta, Georgia

[66]

[Certificate of Service]

[Tr. 1]

TRANSCRIPT OF PROCEEDINGS
COURT OF APPEALS

* * * * *

Northern District of Alabama
May 14, 1976

* * * * *

[Tr. 2]

APPEARANCES

FOR THE PLAINTIFF:

Mr. C. A. Poellnitz
Poellnitz, Cox, Robison, McBurney
& Jones
P. O. Box 876
Florence, Alabama 35630
Mr. William M. Earnest
Elarbee, Clark & Paul
750 Coastal States Building
Atlanta, Georgia 30303

FOR THE DEFENDANT:

Mr. William E. Caldwell,
Acting Regional Attorney
National Labor Relations Board
Region 10
730 Peachtree Street, N.E.
Room 701
Atlanta, Georgia 30308

[Tr. 3]

PROCEEDINGS

April 15, 1976 10:30 A.M.

THE COURT: The matter we shall take up at this time is the case of Robbins Tire and Rubber Company versus National Labor Relations Board, CA 76-H-528-NW. Sometime early this week, I believe it was on Monday, April the 12th, Mr. Charles Poellnitz, attorney in Florence, telephoned my office and indicated that he had a complaint that he wanted to file that he felt entitled him to some immediate relief and that he wanted a setting time to consider the matter, although the complaint had not actually been filed at that point in time, and I told him that we would be in a position to take it up Thursday, April the 16th, at 10:30, and he should, of course, so advise the NLRB counsel.

This morning there was filed in the court in addition to the complaint an affidavit reflecting that notification, the affidavit being of Mr. William N. Earnest, attorney in Atlanta. I assume, Mr. Poellnitz, that a copy has been served on the NLRB.

MR. POELLNITZ: Yes, sir.

THE COURT: I think for the record it may be good first if you would introduce Mr. Earnest.

MR. POELLNITZ: I will, Your Honor.

[Tr. 4]

THE COURT: And then if the NLRB would introduce himself for the record so that we can have those names on the record.

MR. POELLNITZ: Your Honor, this is William Earnest who is a member of the District Court Bar of the Northern District of Georgia and a member of the firm of Elarbee, Clark & Paul of Atlanta, and is actually a specialist in labor matters and is telling me what to say in this case.

THE COURT: Fine. Glad to have you here.

MR. CALDWELL: If Your Honor please, appearing for the Government, William E. Caldwell, Acting Re-

gional Attorney in Atlanta. I'm admitted for the Eastern District Court in Tennessee, and if Your Honor please, I did receive the copy of the complaint and application from counsel about ten minutes ago.

THE COURT: I received it an hour ago, so we're nearly even.

MR. CALDWELL: If Your Honor please, I also filed about five minutes ago a motion to dismiss or in the alternative for summary judgment and the supporting memorandum. I trust it's in reasonable response since I did not know the contents fully of the application.

[Tr. 5]

THE COURT: The complaint or the copy of it that I have received does not show that it has been verified.

MR. POELLNITZ: Your Honor, the reason for this is I had the original in Florence and got here about 10:00 this morning and brought the verification with me.

THE COURT: All right. There's a verification, then, that has been filed verifying the facts.

MR. POELLNITZ: Yes, sir.

THE COURT: I see.

MR. POELLNITZ: I had that done in Florence and had the paper with me and didn't feel like entrusting them to the mails.

THE COURT: Mr. Caldwell, while I review the motion to dismiss and the accompanying brief that you filed, I'm going to ask you, if you would, to review carefully the complaint since you have not had a long time to look at it either and to point out to me what factual allegations in there that you think might be in dispute. Most of them appear to be more or less routine-type factual-type allegations, but if you would, be prepared to indicate what factual allegations in there might be in dispute.

MR. CALDWELL: Yes, Your Honor.

[Tr. 6]

THE COURT: Thank you, Your Honor.

(Short pause)

THE COURT: Did you find any difficult factual disputes with the basic facts set forth in there?

MR. CALDWELL: No, Your Honor. There is one very minor item on page 3, item 10. It refers to a hearing being set on the objections. That document has not in fact actually issued yet. It's my understanding that it is being issued and consolidated, so I have no objection.

THE COURT: For all practical purposes, on April 27, 1976, then, there's going to be a hearing both with regard to the charges that were filed and also with regard to the election itself.

MR. CALDWELL: Yes, Your Honor, that is correct.

THE COURT: Let me ask you a question with regard to one of the cases that you've cited in here, and I've not read the Renegotiation Board, First Banacraft case. Was that decided before the '74 amendment to the Freedom of Information Act? Was it dealing with the old Act or the new Act?

MR. CALDWELL: I believe, Your Honor, it was the old Act. It was decided February 19, 1974.

THE COURT: It has to be the old Act, then.

[Tr. 7]

MR. CALDWELL: And that was the old Act.

THE COURT: The new Act didn't come in until November of '74.

MR. CALDWELL: That's right, the latter part of '74.

THE COURT: And the Sears, Roebuck case necessarily was.

MR. CALDWELL: Yes, Your Honor, it was, too.

THE COURT: Mr. Poellnitz, do you or Mr. Earnest have anything by way of evidence you want to offer?

MR. POELLNITZ: No, Your Honor. The facts as I understand it are really not disputed.

THE COURT: Mr. Caldwell, does the Board have anything by way of evidence that they desire to offer?

MR. CALDWELL: No, Your Honor.

THE COURT: So, it's just strictly a matter of argument and application of legal principles.

MR. CALDWELL: As I understand it, Yes, Your Honor.

THE COURT: Well, let's just chat it out for a minute. How about that? I fully agree with the first two pages of your brief.

MR. CALDWELL: Thank you.

[Tr. 8]

THE COURT: That's not saying I deny the rest of it. I'll just address myself to the first two at this point in time. I think that there is a reluctance of the District Courts, and necessarily so and for various reasons, to interfere with the ongoing proceedings of the NLRB and, more specifically, to enjoin any scheduled proceeding before the NLRB. The only exceptions, I think, perhaps to that would be where the NLRB is violating its own rules or exceeding specific delegations of authority. I don't think that either of those principles are present here. It doesn't appear to be.

So, it would certainly appear that, for the moment at least, this Court would have to hold that it doesn't have any way to enjoin those proceedings as such. I do think, however, that the Court can take jurisdiction under the Freedom of Information Act here where there has been no delay on the action of the company to pursue its rights under Freedom of Information.

As soon as the hearings were scheduled, they promptly said we want the affidavits and statements of people who will testify. As soon as that request was denied, they promptly filed an appeal. I recognize that the appeal period has not expired at this point in

[Tr. 9]

time and that customarily, in fact, almost uniformly Courts cannot and should not accept jurisdiction to review agency action while the proceedings are still in progress, until there's been an exhaustion, but there are exceptions to that and those exceptions may very well exist here. Yes, sir.

MR. EARNEST: I might point out that in the affidavit that I have, I have contacted the General Counsel's office in Washington and was advised by phone that their policy had not changed in denying such appeals as stated in my affidavit.

THE COURT: I think the amount of litigation that is apparently developing suggests this, too.

MR. EARNEST: And it was not our intention to—we did intend if at all possible to wait until we had received a letter, but the timing of that letter was not within our hands and the letter may well have come back after the hearing began.

THE COURT: The Federal Mogul case that you cited in a footnote in your brief was a different situation than here presented because there the Federal Mogul had not even filed an appeal to the General Counsel prior to coming into court, asserting while we have still got time to appeal that they—in that case factually, they had asked for the

[Tr. 10]

information, had been denied at the Regional level, came straight to court five days later or something like that, and when we had the hearing ten days later, I said have you appealed to the General Counsel. No, we haven't. Our time hasn't expired yet. They had not even sought relief through the administrative remedy at the time they were asking the Court to intervene.

Here these people have in fact actually sought and done everything they can to exhaust. They've set it in motion. So the question is simply whether there's a sufficient justification to make an exception to the general rule that you don't take jurisdiction during the administrative process. They've done everything that they can and promptly so to at least initiate the administrative process, whereas in Federal Mogul they had not. They had taken Step One, had an adverse decision, didn't even take Step Two, and came straight here and actually when we had the hearing, had not even taken Step Two.

So, there's a distinction, I think. It really seems to me that while I can't and don't intend to enjoin the NLRB

proceeding, I don't think that I should, I don't think that the plaintiff really could show irreparable injury even if we could

[Tr. 11]

find some perhaps violation of a rule that would give me a right to enjoin. So, I don't really think that I should.

I do think, however, that this Court does have jurisdiction under Freedom of Information after exhaustion of administrative procedures. I think that that jurisdiction is not absolutely predicated on exhaustion where circumstances suggest that exhaustion can be waived. Here we have the plaintiff facing the prospects of a hearing on the 27th having made what I feel and conclude is a proper request at least for information. They've described it properly, they've done it timely, the information is definitive. It's not an "open your whole bag" approach. It's just give us the statements or affidavits of people you expect to call. They limited it in that fashion.

It seems to be generally covered, and they certainly but for your asserting the specific offenses, the specific exceptions or exemptions that the Board has, on the surface they are entitled to what they've asked for and they've done it timely. So, then, we come to a point of the exemptions and whether they are valid exemptions to the information, keeping in mind, as I indicated to you, asking you

[Tr. 12]

if that Supreme Court decision was under the old Act or new Act. If that decision were under the new Act, I think we would fold up the proceedings and go home.

I think that fully covers the proceedings and you would be entitled to win. I don't think that the Supreme Court will hold that under the new Act. The new Act is a hole new ballgame, it seems to me. Certainly the District Court in Washington correcently concluded that the Exemption Five is not present. Yes, sir.

MR. CALDWELL: May I, Your Honor, at this point—

THE COURT: Y'all both interrupt at any time. I'm just sharing with you some thoughts.

MR. CALDWELL: I was listening without interrupting. If I may go back, there are a couple of points. I'm not, with all due respect, sure that I agree with Your Honor that the Federal Mogul—it was a distinction without a difference perhaps, because I see it as the same whether they had exhausted or not exhausted in that you are saying that the time that a hearing it set expedites or moves and changes the Federal Information Rules of appealing and so forth because, of course, we expedited our response

[Tr. 13]

at the Regional level two days after the answer and as quickly as we could even though we had a longer period of time in which to respond, and I think whether we had responded before this Court or they had not appealed before this Court or they had appealed before this Court doesn't in fact make a difference as to the legal issue under the Freedom of Information Act.

THE COURT: No. The point there was simply to say that they had here done everything they could toward exhaustion, whereas in Federal Mogul they had not.

MR. CALDWELL: To that extent I would agree, but as a legal result I don't think there's a great deal of difference. Now, I think, Your Honor, I'm in accord that the Freedom of Information Act did not change the authority of jurisdiction of a District Court to enjoin Board proceedings at this stage before a hearing. I think, Your Honor, that—I recognize that District Courts around the country have varied widely in their interpretation of their jurisdiction under the Freedom of Information Act to require production or not require production of affidavits, some Courts holding that the Board was required to, others that the Board was not required to, and it is a very difficult area which is in a great state

[Tr. 14]

of flux at the present time. There's no appellate court, no Supreme Court decision certainly on it since the amendments.

There's only one appellate court decision, as I understand it, reviewing the lower courts and determining whether statements were exempt under Section 7 A of the Act, and that is the Title Guarantee decision which issued just the other day in the Second Circuit. I have a copy of that decision if Your Honor would like.

But that goes on the merits of whether statements taken by the Board in an Unfair Labor Practice proceeding are available, and I think, Your Honor, that the Freedom of Information Act creates a right in the public for certain information from the Government, and the fact that the party requesting that information is a private litigant or not with the Government doesn't increase his rights nor decrease his rights under the Public Information Act and I think he's to be treated as a member of the public without regard to his status of dispute with the Government as to whether he's entitled to that information under the Freedom of Information Act.

So, the fact that the party here is coming up for an Unfair Labor Practice with us doesn't

[Tr. 15]

entitle him to more or less consideration than someone who comes in that says I'm entitled to that information under the Act.

THE COURT: It doesn't entitle him to any more information or any more rights under it, but may very well justify a capsuled timetable and expedited proceeding or, in certain instances, perhaps a shortcutting of final exhaustion to get into Federal Court to assert rights that otherwise could be asserted by a private individual.

MR. CALDWELL: Which gives the Court jurisdiction.

THE COURT: Purely and simply jurisdiction—

MR. CALDWELL: Yes, sir, Your Honor, jurisdiction, and under the Act, of course, jurisdiction to enjoin the Board from not producing the statements if they find that they're entitled to them. To that extent we are in agreement. I would only suggest that the Court of Appeals decision in the Title Guarantee interpreting exemption under Section 7 is at this point dispositive of the issue. I hope that we're going to have some other Court of Appeals decisions issued in the very near future which will adopt that similar approach to this exemption and Board statements. I have a copy, Your Honor, of the Second

[Tr. 16]

Circuit's decision.

THE COURT: I would like it because I don't have it, I see the quotation from it here.

MR. CALDWELL: I did not duplicate it, Your Honor, and I have it only in the Daily Labor Report.

THE COURT: Is it in full?

MR. CADWELL: Yes, Your Honor, I believe it is.

THE COURT: Carol, take it down and make—do you have a copy?

MR. POELLNITZ: Yes, sir, one copy.

THE COURT: Take it down and make a couple of copies, Carol.

MR. POELLNITZ: Your Honor, before we get into the further discussion of Mr. Caldwell's remarks, it seems to me that we ought to at least pause a minute and put this thing into focus as to what the practical effect, that is, the irreparable injury that the defendant in the NLRB proceeding will be put in. I think it's maybe not, that maybe the case doesn't turn on that point, but it's certainly appropriate background, and if you'd let Mr. Earnest tell you, he's in charge of that hearing.

THE COURT: I'd like to hear from him. I might mention that I have a difficult time finding,

[Tr. 17]

so I would like to hear it, finding irreparable injury because of the nature and scope of review by the Circuit

Courts of Appeals of NLRB decisions, which scope of review clearly covers denials of Constitutional rights or denial or rights secured by other statutes and related matters.

MR. EARNEST: Well, both Mr. Caldwell and I, Mr. Caldwell presently being with the Board and myself formerly being with the Board and Your Honor being familiar, I'm sure, with the Board procedures—in the trial of the Unfair Labor Practice case of the investigations case, the Court's procedure is that after the witness has testified that upon proper request the Board will turn over any affidavits, statements, like that to the opposing party for his examination at that time. The practical effect is that the—

THE COURT: Using the criminal approach.

MR. EARNEST: Yes, sir. The practical effect that the Administrative Law Judge gives the opposing attorney some few minutes, three to five minutes to examine the affidavit and then he has an opportunity to cross-examine at that time using the affidavit. At the conclusion of that cross-examination, he must turn the affidavit back over. He has no use of that

[Tr. 18]

affidavit with other witnesses, either prior witnesses or following witnesses. He's not entitled to it.

THE COURT: Do they do that pursuant to a rule that they have or just a matter of custom? Why do they give them at the conclusion?

MR. EARNEST: I think maybe Mr. Caldwell could speak to that.

MR. CALDWELL: It is a rule of the Board that upon request after calling the witness they are to produce the statement, and counsel is, to my knowledge, every time in a hearing counsel asks for the affidavit he's allowed to recess and allowed the time necessary he wishes to examine it and there's no particular time limit placed on him by the Judge. If it gets to ge a half hour, unreasonable, of course—but the Judge looks at the length of the affidavit and allows him time to examine it.

THE COURT: Let me ask Mr. Caldwell this question because this bothers me with regard to the Title Guarantee decision, which I've not read. If the Title Guarantee goes out on a 7 A exemption, which I thought I understood you to say it did—

MR. CALDWELL: I think that was the narrow limits of the decision.

THE COURT: If it goes out on a 7 A exemption,

[Tr. 19]

what is the justification for a conclusion by the Court there or by anyone that the enforcement proceedings are interfered with by giving affidavits before the proceeding that the absolutely by the rules of the Board going to be given during the proceeding? What's the justification for showing an interference with the proceeding?

MR. CALDWELL: Well, without going into it extensively, as I understand it, the Court considered the very peculiar nature of a Board proceeding in that many of the witnesses you're calling are employed by and depending on their livelihood with the employer respondent against whom they're going to testify and the Board or the Court considered that an important factor in how they could be affected by turning these over prior to their testimony and that it would interfere or had the tendency to interfere with the enforcement proceedings.

THE COURT: Well, now, they know the identity of these people, don't they?

MR. CALDWELL: No, sir, they don't know the identity and we do not reveal the identity of individuals to whom we talk prior to calling them as a witness. This is a matter of strict confidentiality between the Board and the witness and we don't reveal

[Tr. 20]

to anyone, as a matter of fact, to whom we have talked. Now, some may know or speculate or guess, and of course, the charging party presents certain witnesses to us. He knows who he presents or who he suggests we see. We

may not in all cases be able to see them or they may not give us a statement. When the company cooperates, of course, they know which supervisors they presented to us. They may or may not on occasion know whether that supervisor gave us a statement or not in that that witness may come in to us in private and say I'd prefer not to be involved or give you a statement in the case, or we may see a witness presented by the Union who says I don't wish to be involved or don't want to give you a statement, or one may volunteer, or on occasions a supervisor may come to us voluntarily and say yes, I know about this, let me tell you what happened, and the company may not know that we have talked to the supervisor.

THE COURT: But they will know if you use him.

MR. CALDWELL: If we use him, they will know and they're entitled to the affidavit. I might add this case presents a peculiar or very interesting offshoot in that the respondent asks for the statements of witnesses we'll present and in this case we have

[Tr. 21]

both an Unfair Labor Practice proceeding and a proceeding concerning objections filed by the Union. Now, as the Government attorney representing the public and the Board, we litigate only the Unfair Labor Practice proceeding and we don't litigate the objections except to the extent that they may be encompassed coextensive with the ULP's, Unfair Labor Practices. So, we would call certain witnesses to establish our Unfair Labor Practices and by the same token those will establish certain objections, but there may be other objections filed or may be material relating to objections and we have seen and we have investigated the matter and it's determined a hearing is appropriate and we have witnesses, statements from those witnesses, we're not going to call them.

THE COURT: Then he has no request to that information.

MR. CALDWELL: But under the Freedom of Information Act asking for statements of witnesses in the possession of the Government, as a matter of the public he could reasonably argue he's entitled to those statements as the ones of the witness we're going to call.

THE COURT: Well, he wouldn't be entitled to those under his request.

[Tr. 22]

MR. CALDWELL: No. I agree under this request.

THE COURT: So, you're arguing an academic question.

MR. CALDWELL: Yes. I'm just pointing out that there is this problem and that under the Freedom of Information Act, if you say he's entitled to statements in the possession of the Government as public, not as a private litigant but as a general member of the public, is it reasonable to argue—

THE COURT: That's the only way he stands here is under the Freedom of Information Act is a member of the public.

MR. CALDWELL: So, the fact that he's in litigation and we have statements of witnesses we're going to present doesn't give him any more right than he would if he was a member of the public. The fact we're going to call the witnesses doesn't add to his rights.

THE COURT: That's just his method of ascribing what he wants.

MR. CALDWELL: Yes, Your Honor.

THE COURT: I personally wondered why he described it that way, why he limited himself that way.

[Tr. 23]

MR. EARNEST: I purposely did that for the very argument that he now raises. Let me say with regard to some of the statements that the Board has raised that the Board does have a procedure of sending out subpoenas prior to the hearing.

THE COURT: As to all witnesses?

MR. EARNEST: As to the witnesses that they intend to use. In the past they have not been secretive of about who was received those subpoenas and in fact in

the past have on occasion told me which witnesses were going to be used. Employees also will come up, and I think this is—it's worked well between the employers and the Board because the employer must know who is going to testify so that he can schedule his work force. With regard to the Board's fear of any retribution by the company against people whose names were known ahead of time, quite frankly these individuals would enjoy more protection than those names who were not known. There's a specific section of the Act, Section 884, which prohibits employers from taking action against such individuals, and a company would certainly be at a disadvantage to be put on notice as to who such witnesses were. I really don't share that fear.

In fact, the employer has a—it puts the

[Tr. 24]

employer to a disadvantage should they choose to discipline somebody who in turn has done something warranting discipline and who in turn testifies or is known to be testifying. It's extremely difficult and chancy to discipline somebody who is known to be going to testify or is known to be in favor of Section 7—

THE COURT: Let me get right down to the bottom line of it really. In the final analysis, assuming that I stay where I am, and don't think I'm going to budge from that position that I don't have any business enjoining a proceeding or stopping the proceeding, I don't see any justification for that, we're dealing purely and simply with a Freedom of Information jurisdiction, that, assuming that I stay where I am, and I'm inclined to stay there at the present time, that I consider jurisdiction of this Court properly invoked notwithstanding the failure to exhaust because of the unusual timetable the person who's seeking the information is under, then, if I stay there, are we not then squarely presented with the question, the academic matter of law question of whether statements such as these are exempt under 7 A—

MR. POELLNITZ: Of witnesses who are expected

[Tr. 25]

to testify.

THE COURT: That's right, just a pure matter of law, the one that the Second Circuit wrestled with in Title Guarantee—with the idea, with the idea that if, as the Second Circuit may have held, it is an exemption, summary judgment for the Board or dismissal or what-have-you would be appropriate. If the Second Circuit's decision is not quite as strong as Mr. Caldwell says it is, and he feels pretty good about it, although I happen to disagree and don't feel particularly bound by the Second Circuit, and I were to conclude that it's not an exemption, I still can't enjoin the Board. The only thing I could do, as I see it, would be to direct the Board to give the statements that were requested and they say and that these statements must be delivered pursuant to my order within X days preceding any hearing where those people are going to be called and then leave it to the Board to decide whether it wants to continue its own hearing because of that type ruling or deliver the statements or seek some emergency relief somewhere else. You see what I'm saying?

MR. CALDWELL: I see what you're saying, Your Honor, and I will say if Your Honor issues that order we're certainly not going to be in contempt of this

[Tr. 26]

Court and go ahead with the hearing if you say produce the statements in so many days before the hearing—

THE COURT: But I'm not enjoining the hearing.

MR. CALDWELL: Oh, but you would be, Your Honor, because if we go to the hearing after that kind of an order when you said produce the statements and we failed to produce them—

THE COURT: No. You'd either have to produce the statements or forego the hearing, but that's your choice.

MR. CALDWELL: Yes, and I understand that. We're obviously not going to the hearing, as we have got to postpone the hearing. So, it has the same effect as enjoining the hearing. You might as well, Your Honor, to enjoin the hearing as to say produce them in so many days. Your Honor, this gives this litigant with the Board

greater rights than someone that's not in litigation with the Board under the Public Information Act.

THE COURT: No. If a private individual can come in here and show a need for expeditious receipt of the information he's otherwise entitled to under Freedom of Information Act—let's just say, for example, a person in about to be deported and he seeks from the Immigration officials some documents

[Tr. 27]

that would save him from being deported and he's asked for it and the information was denied, he appealed and the deportation hearing was set, the appeal had not been decided and he came in here, I think that this Court would have jurisdiction, one, to waive the normal exhaustion, two, to enter final judgment, if in fact he's entitled to the information, direct that information forthwith be produced.

MR. CALDWELL: So, you would find in that case, though, Your Honor, irreparble injury, the man being deported.

THE COURT: No. I'm just showing that he has made out a case for entitlement to the information under the Freedom of Information Act and his request for that information has been expedited because of some other circumstances. Do you understand what I'm saying?

MR. CALDWELL: I understand what you're saying, Your Honor, and I'm reading it from the other side, I'm sure. I understand what you're saying, Your Honor, but to me it has the same effect as if you said you are enjoined from holding the hearing until you produce or produce it before you hold a hearing.

THE COURT: Except this: I'm pointing that out because I'm not saying that he's getting more

[Tr. 28]

rights because he's in litigation with the Board, he's getting the same rights as any other person, if, you know, he's entitled to the information. He's geting the same

rights as any other person would be under the Freedom of Information Act. The only thing he's getting is an expedited determination of those rights because of something happening.

MR. CALDWELL: Well, Your Honor, as I understand what you're saying, it seems that you're boing farther in that situation. Being removed from the country until you get the information is a type thing you're showing, in effect, I'm going to suffer irreparable injury unless I get this information very quickly and soon.

THE COURT: Irreparable injury is not—and let's think of another example because I'm not trying to put it on an irreparable situation. I'm trying to put it on a situation that generates a factual basis that says I need help promptly. Maybe it's reparable harm rather than irreparable, but still the reparable harm could justify an expeditious handling of it.

MR. CALDWELL: But you've got to put it on that basis that he's going to suffer harm if you do this.

THE COURT: The point is I could find here

[Tr. 29]

that his harm is reparable harm, that is to say, whatever he may be denied in the forthcoming hearing the Fifth Circuit can straighten out on direct appeal. So, it's reparable. But even though it's reparable, he may, nevertheless, be entitled to an expeditious determination here that he's entitled to that information forthwith.

Now, we all travel on the premise that I conclude that he's entitled to the information notwithstanding what the Second Circuit has said, but let's keep talking on that vein. Let's keep talking on that vein. Let's say that I do determine that they are entitled to this information period, notwithstanding the Second Circuit, I could do one thing. I could say you shall forthwith deliver.

MR. CALDWELL: Yes, Your Honor.

THE COURT: That's the normal, just say give them the information and give it to them before the sun sets tomorrow or whatever.

MR. CALDWELL: Which is the remedy provided by the Public Information Act that you will not refuse to produce.

THE COURT: That's right. But rather than go to that extreme, since you would be raising such a serious objection to it, I would, in effect, be

[Tr. 30]

giving you an option that that type of relief wouldn't give you. I would be saying to you, you give it to him by tomorrow night if you intend to use them at a scheduled hearing or you give them to him by seven days before any hearing that they would be used at. It's relief more than what I would think the NLRB would be entitled to under the Freedom of Information Act if the information is otherwise required to be produced.

MR. CALDWELL: How, Your Honor, is that not the same remedy as to enjoin the Board proceedings which you admit you don't have jurisdiction to do?

THE COURT: I do not and I assert for the record that I don't think I'm entitled to enjoin the Board's proceeding. I am, here again assuming that these are producible, I am vested with jurisdiction and the obligation to tell a private person you are entitled to these documents and to tell a public agency you shall forthwith deliver them to them.

MR. CALDWELL: To that I agree.

THE COURT: If I find that to be the facts and the law in this case, that is a decision I could render.

MR. CALDWELL: Yes, Your Honor.

THE COURT: That is less onerous, seems to

[Tr. 31]

me, to the Board than to say you shall deliver them seven day before a hearing, any hearing. In the first place, he's defined what he wants in relation to what you're going to use at a hearing. So, necessarily, it contemplates something that's going to be used at a hearing.

MR. CALDWELL: All right. But Your Honor, that's

taking the remedy one step, as I see it, beyond the authority granted in the Public Information Act and is doing by indirection a blockage of the Board's hearing in this matter absent compliance with your order. You might as well, Your Honor, say to the Board you are enjoined from holding the hearing until you produce. You're saying produce or you can't hold a hearing.

THE COURT: All right. Let's stop, then. Let's don't go that far. Let's say that we find that they're entitled to the information and I enter an order that says you shall by April 17th deliver to them the statements period.

MR. CALDWELL: Yes, Your Honor.

THE COURT: Have I enjoined your proceedings:

MR. CALDWELL: No, Your Honor, you haven't.

THE COURT: All right. Now, would you rather have that type decision or would you rather have one

[Tr. 32]

that says you shall deliver the statements ten days before any scheduled hearings? Now, which would the Board rather have?

MR. CALDWELL: You really give me a Hobson's choice.

THE COURT: No. One you tell me I don't have authority to do because I'm enjoining your proceeding. I think that helps you.

MR. CALDWELL: All right, Your Honor.

THE COURT: The other one is the one you say I clearly have authority to do but I believe it's the one that you're not going to select.

MR. CALDWELL: I think I am, Your Honor, and I would say this. Maybe someone from the Washington enforcement branch that is more knowledgeable in this area than I am, since I'm committed to General Counsel in this area—but if you say produce by April the 17th the statements, as I read it, you're within the scope of the Freedom of Information Act and we may file a request for a stay and appeal that ruling, as I understand it, and we could go ahead and hold our Board hearing. If you issue that order and that order is strictly within, I

will take the position that that would be strictly within the Freedom of Information and we can appeal that as to whether these

[Tr. 33]

are exempt, and that's ruling strictly on the merits.

THE COURT: But you're going to carry a tough burden to get a stay, aren't you?

MR. CALDWELL: Well, a stay only of your order pending this appeal. I would not relate to the Board's Unfair Labor Practice hearing because your order wouldn't go that far. You follow me?

THE COURT: I say, but you would have a hard time justifying why you're entitled to a stay of that order.

MR. CALDWELL: A stay while we appeal, or at least we could file our appeal to the Court as to your order to produce the statements and we're strictly within the scope of the Freedom of Information Act and whether the exemption 7 A applies because you would be saying, in effect, they're entitled to these statements under 7 or under the Act and they are not exempt under the exemptions, and to that extent I'd say yes, this puts it in the proper posture, the proper form and proper line of progression. But with that order we would still be entitled to go ahead and hold our Board hearing because it was merely a matter of producing within that time frame those statements which we claim are exempt and would not jump over into the right of this Court to enjoin by direct

[Tr. 34]

action or indirect action a Board proceeding. You can say it either way, Your Honor, as I see it. You can say you're enjoined, Board, until you produce or you can say produce and don't hold a hearing until you do and the results are the same that you have enjoined the Board proceeding.

THE COURT: The way they've described the information, it necessarily contemplates your hearing because any direction that I will give to you to produce would have to say you shall produce those statements and affi-

davits of those persons who you intend to call at a hearing in connection with these charges.

MR. CALDWELL: That frames the statements. That's a description of the statements, but that doesn't, as I see it, Your Honor, intrude over to what I say is beyond the Court's jurisdiction which is enjoining of the Unfair Labor Practice hearing that is scheduled before the Board and I think the authority is clear that you can't extend that much farther beyond what you just said.

THE COURT: I think that's correct, but we're traveling academic at this point—

MR. CALDWELL: I hope so, Your Honor. In any event, that is how I would view the interpretation of

[Tr. 35]

the discovery rights, the rights of litigants to enjoin Board proceedings and the extent of the Court's authority under the Freedom of Information Act.

THE COURT: I think your filing of the motion to dismiss or in the alternative summary judgment emphasizes something that I said at the beginning, and that is, that we're dealing here really with a, for all practical purposes, a pure question of law.

MR. CALDWELL: I think we are, Your Honor.

THE COURT: And I don't see any reason not to and, consequently, I hereby order that under Rule 65 we shall advance to trial on the merits to this point in time and that whatever we do will be a final adjudication either finally adjudicating that you're not entitled to anything as the plaintiff or finally adjudicating that as a matter of law the Board is required to produce something so that either side would be in a position to take some further step if necessary. I don't see any reason, in other words, not to advance and consolidate the final hearing on the merits to this hearing here today and it's so ordered.

Have you had a chance to look at the Title Guarantee case?

MR. EARNEST: I have yes.

[Tr. 36]

THE COURT: Does it hold what Bill says it does?

MR. EARNEST: I don't—and I'd have to go back and re-read that part, but I don't think it gets into the jurisdictional end of this at all which I think we may have passed already here. It does get into 7 A, and I think under the 7 B and 7 C, in effect, I felt like gave approval to the District Court's decision. Under 7 A—

THE COURT: I've got to assume that because Mr. Caldwell didn't argue those to me. He argued 7 A.

MR. EARNEST: Under the 7 A, what we have tried to do in our memorandum is while we don't agree—we agreed with the lower court's decision obviously. I think the Fifth Circuit would not have followed the Second Circuit's decision in this case, and even though the decisions we cited to you were prior to the amendment, I think it shows the Fifth Circuit's definition of what might be interference with enforcement proceedings and I think the Board is to prove, not just by an allegation, but to prove what that interference would be. We can see no interference. We have waited until the investigation, investigation of both

[Tr. 37]

of these matters had been completed. We're as close to the hearing as I think we could be and it is not our desire to interfere with that and, frankly, we see no interference.

So, I think the Fifth Circuit has indicated its particular feeling in limiting the scope of the 7 A exemption, and that's in a recent case, I think, of Stokes. That particular case involved, I think, some seeking of records of the Occupational Safety & Health Administration and it did get into the enforcement area. I think that the Fifth Circuit has talked in terms of that. That case may have been since the amendment.

THE COURT: No, no. It was a '73 case.

MR. EARNEST: All right. Your Honor, I would also refer you to the lower court's decision in this regard. I

think that particular case is a well-reasoned decision, the case which we also cited in our memo, memorandum—

THE COURT: Bellingham.

MR. EARNEST: The Bellingham case. I think that covered that point, and its decision, as I read the Bellingham case—and we attached some other cases, too. As I read the Bellingham case, it did not predicate its finding no exemption under 7 A on

[Tr. 38]

the Title VII case. In other words, it found that independent of the Title VII decision was my reading of it. It did cite the Title case in connection with a further exemption which we're really not into.

THE COURT: Mr. Caldwell, it's clear that the burden of establishing an exemption, I think, perhaps rests with the NLRB in this situation. Is there anything unique about the statements or unusual that would cause them to interfere with the enforcement proceeding or is the Board's position with regard to the statements that as a general proposition the giving of virtually any statement would interfere?

MR. CALDWELL: I will have to accept the latter description. There's nothing unique in Board proceedings in these statements, no.

THE COURT: So, we're traveling basically under a situation where you don't need to go forward and make a showing that these particular statements would interfere. We'll assume, I take it, for the purposes of this case that these are just normal statements and that the Board's position would be that these, like any other statements, would interfere.

MR. CALDWELL: Yes, Your Honor, yes.

THE COURT: O.K. All Right. Is there anything else that either of y'all would like to file

[Tr. 39]

or say? I think I understand it. I don't know that I'm able to answer it, but I think I understand it.

MR. CALDWELL: May I have just a moment, Your Honor? I was looking to see if I had a case that would be of some importance.

THE COURT: Please do. Mr. Caldwell, was this an extra copy of the brief?

MR. CALDWELL: Yes, sir. I filed one with the Clerk. Your Honor, I don't believe that I have anything further to offer. I think the Board's argument is fully set forth in Title Guarantee and the cases cited and we rely on that as to the merits of the availability of the statements and the application of 7A.

THE COURT: All Right. Anything further from y'all?

MR. EARNEST: I would like to request that Your Honor take a look at the District Court decision also with regard to that District Court—

THE COURT: Was that reported somewhere?

MR. POELLNITZ: We're getting you a copy of it right now, Your Honor. It's in the Labor Reports. I haven't seen it in Fed. 2d.

MR. EARNEST: It's so new you have a problem of getting it, but I request that Your Honor look at

[Tr. 40]

that.

THE COURT: It's no longer the law, is it?

MR. EARNEST: Of that Circuit, yes, sir.

MR. POELLNITZ: It's an interpretation of the Freedom of Information Act and somebody is going to have to eventually interpret it.

THE COURT: Was the decision in the State of Washington appealed, do you know?

MR. CALDWELL: No, I don't, Your Honor, I'm sorry, but we're appealing a great many of them I'm afraid. We've been sustained and overruled in any number of cases. I would suspect that all of the adverse decisions are being appealed though, Your Honor.

THE COURT: Well, that's an adverse decision. It's as adverse as it can be.

MR. CALDWELL: That's right, and I would say without knowing that one specifically, but I'm sure as a general matter we're filing appeals on all of the adverse decisions.

MR. EARNEST: Your Honor, I would also refer you to the Sears case which I think the Labor Board—I believe it's my Exhibit I attached to the complaint. It's the Supreme Court Sears case, and I think in that particular case, although the issue was not

[Tr. 41]

exactly the one that we're faced here with, the Court did point out in that particular situation that it was not going to make a determination with regard to a Section 7 exemption. It pointed out that the Board had not raised this as a defense in the District Court but first raised it when they got to the Court of Appeals and that the Court of Appeals went ahead and decided against the Board without referring to the Section 7 exemption, and the Court had some language in its decision on that. I don't think there was any definitive one way or the other, but it may help Your Honor with what the mood of the Court may be should they be faced with that, Supreme Court, excuse me, Supreme Court of the United States. I think that the Court also noted in that particular decision that they didn't make the Section 7 exemption claim when the Act was more favorable to it than the present Act is.

THE COURT: All right, then. I will take the matter under submission and hopefully we'll have something on it in the next few days consistent with my other work policy.

MR. POELLNITZ: Thank you, Your Honor.

MR. CALDWELL: Thank you.

CERTIFICATE

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

I do hereby certify that the above and foregoing typewritten matter is a true and correct transcript of the stenotype notes of the proceedings herein, taken down by me, and transcribed under my supervision, at the time and place hereinbefore noted.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I in anywise interested in the result of said cause.

/s/ John T. Weaver
JOHN T. WEAVER
Court Reporter

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
)
NORTHERN DISTRICT OF ALABAMA)

I, JAMES E. VANDEGRIFT, Clerk of the United States District Court for the Northern District of Alabama, do hereby certify that the foregoing pages numbered from one (1) to forty-two (42), both inclusive, comprise the original pleadings in this action and are herewith attached, as a full, true and correct transcript of the supplemental record on appeal in the matter of ROBBINS TIRE AND RUBBER COMPANY, Plaintiff-Appellee vs. NATIONAL LABOR RELATIONS BOARD, Defendant-Appellant, Civil Action No. 76-H-0528-Northwestern Division, as fully as the same appears of record and on file in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at Birmingham, Alabama, in said District, on this the 17th day of May, 1976.

/s/ James E. Vandegrift
JAMES E. VANDEGRIFT, Clerk
United States District Court

[dated April 20, 1976]

* * * * *

EMERGENCY MOTION FOR STAY PENDING APPEAL

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

Pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure, the National Labor Relations Board, defendant-appellant herein (hereafter "the Board") moves this Court to stay an order issued by the United States District Court for the Northern District of Alabama, Northwestern Division (Hancock, J.) on April 16, 1976 in the above-captioned matter. In support of this motion, appellants show as follows:

1. On April 15, 1976 appellee filed a Complaint and Application for Temporary Restraining Order in the court below requesting that the Board be compelled, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended 88 Stat. 1563, *et seq.*, to produce written statements obtained either during the course of the Board's investigation of unfair labor practice charges in Board Case No. 10-CA-11762 filed against appellees, or during the course of the Board's investigation of its Board Case No. 10-RC-10410, a contested election. After hearing the matter on April 15, 1976, the district court on April 16, 1976 issued an order compelling the Board to produce the statements of witnesses which the Board would call to testify in the consolidated proceeding on the unfair labor practice charges and the contested election scheduled for April 27, 1976. The Court refused to enjoin the scheduled administrative proceeding, but ordered that the information be produced either on April 22, 1976 or five days before the commencement of the administrative hearing in Board Case Nos. 10-CA-11762, 10-RC-10410. The district court also stated that it would deny any request for a stay pending appeal. The Board has this day mailed a notice of appeal of this order to the district court (Attachment A, *infra*).

2. It is settled law that a stay pending appeal is appropriate when the party seeking the appeal can demonstrate the existence of four factors: (1) substantial likelihood that it will prevail on the merits of the appeal; (2) it will suffer irreparable injury if the stay is denied; (3) other parties will not be irreparably harmed if the stay is granted; and (4) the public interest will be served rather than harmed by grant of the stay. *Beverly* v. *U.S.*, 468 F.2d 732, 740-741 (C.A. 5, 1972); *Virginia Petroleum Jobbers Ass'n* v. *F.T.C.*, 259 F.2d 921 (C.A.D.C., 1958), cited with approval by the Supreme Court in *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). The Board's motion is supported by all of these traditional criteria for obtaining a stay:

1. *Likelihood of success in the merits.* Every decision of the United States Court of Appeals, both before and after the amendment to the Freedom of Information Act, supports the Board's position in this case that statements of potential witnesses obtained during the investigation of unfair labor practice charges or contested elections are exempt from disclosure prior to the administrative enforcement proceeding under the Freedom of Information Act. See e.g., *Title Guarantee Company* v. *N.L.R.B.*, —— F.2d ——, 91 LRRM 2993 (C.A. 2, 1976); *Wellman Industries* v. *N.L.R.B.*, 490 F.2d 427 (C.A. 4, 1974); *N.L.R.B.* v. *Clement Bros.*, 407 F.2d 1027, 1031 (C.A. 5, 1969).

2. *Irreparable injury to defendants and the public interest.* The district court order requires disclosure prior to the commencement of the unfair labor practice proceeding. Accordingly, unless a stay is granted, the Board must either postpone the scheduled administrative hearing indefinitely pending final disposition of the appeal in this case, risk contempt of the district court's order, or comply with the district court's order and abandon its right to appeal. Since it is clearly not the purpose of the Freedom of Information Act to so impair the Board's ability to carry out the administration of the National Labor Relations Act, a stay of the district court's order would also preserve the public interest in obtaining a speedy resolution of labor disputes.

3. *Lack of harm to the Company.* The grant of the stay would not endanger the existence of the documents the appellee is seeking, nor would it otherwise cause the appellee irreparable injury should it ultimately prevail on appeal. Indeed, the arguments in favor of immediate disclosure in the instant case—that pre-hearing discovery of witnesses' statements would help the appellee prepare its defense to unfair labor practice charges—have no relevance to its rights to information under the Freedom of Information Act. *Title Guarantee Company* v. *N.L.R.B.*, *supra*, 91 LRRM at 2999. In that case the Court noted that under the pre-amendment Exemption 7, the courts had uniformly held that witnesses' statements need not be disclosed because "the substantive effect" of such a ruling "would be tantamount to the issuance of new, broader discovery rules for NLRB proceedings." *Ibid*, at 2994-2995. Accordingly the Court concluded (*ibid.*, at 2999):

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceeding by virtue of a back-door amendment to FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act . . . or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended.

In short the appellee will suffer no injury to rights cognizable under the FOIA.

In other actions under the FOIA, several courts, including the Supreme Court, have found the issuance of a stay appropriate in circumstances similar, if not identical to those presented here. See, e.g., *Polynesian Cultural Center* v. *N.L.R.B.*, where the district court order to produce an affidavit obtained by Board agents (D. Hawaii, Docket No. 74-300), was stayed by Mr. Justice Brennan by order of January 29, 1975 (Docket No. A-625).

WHEREFORE, for reasons stated above, the Board respectfully requests this Court to grant a stay of the order of the District Court pending this Court's resolution of the issue on appeal.

Respectfully submitted,

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D.C.
this 20th day of April, 1976.

By _____

WILLIAM WACHTER, Acting
Assistant General Counsel for
Special Litigation
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 254-9221
Co-counsel: Aileen Armstrong
(Ext. 9001)

[April 22, 1976]

* * * * *

PLAINTIFF-APPELLEE'S RESPONSE TO EMERGENCY MOTION FOR STAY PENDING APPEAL

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Defendant-Appellant's Emergency Motion was received today, April 22, 1976, seeking to have the April 16, 1976 Order of the United States District Court for the Northern District of Alabama, Northwestern Division (Han-

cock, J.) (attached hereto as Exhibit A) stayed pending appeal. Plaintiff-Appellee respectfully moves this Court to deny such stay. In support of this its Response, Plaintiff-Appellee shows as follows:

1.

Rule 8(a) of the Federal Rules of Appellate Procedure requires that a stay of an Order must ordinarily be sought in the first instance in the District Court. Rule 8(a) also requires:

> A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, *with the reasons given by the district court for its action.* The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. (Emphasis added)

There is nothing in the District Court's Order (Exhibit A) denying an application for a stay or anything to indicate the District Court ruled on any such request. In fact Defendant-Appellant does not even contend in its Emergency Motion to this Court that it has first sought a stay in the District Court. Defendant-Appellant sets forth on Page 2 of its Emergency Motion that "the District Court also stated that it would deny any request for a stay pending appeal." This naked assertion is not evidenced by the Order (Exhibit A) nor is a sworn affidavit or the transcript of the April 15, 1976 hearing attached to Defendant-Appellant's Motion. Nowhere are set forth the reasons given by the District Court for the alleged statement of denial of a request for a stay.

No portions of the record are attached to Defendant-Appellant's Motion as required by Rule 8(a).

2.

This Court's decision in *Beverly* v. *U.S.*, 468 F.2d 732, 740-741 (5th Cir., 1972), cited by Defendant-Appellant, sets forth the criteria which must be proved before a stay will be granted. *First*, "the accepted standard for review of such a stay is whether or not the trial court abused its sound discretion in denying the stay" (Ibid., p. 740). Here Defendant-Appellant has made only a naked assertion that the District Court said it would deny any request for a stay. Defendant-Appellant has not set forth the District Court's reasons for the alleged denial nor has it proved that the District Court's alleged denial was an abuse of its "sound discretion." "*ADDITIONALLY*" the *Beverly* case required the Defendant-Appellant herein to establish four factors:

1) "the likelihood of his prevailing on the merits on appeal,"
2) "that he is likely to suffer irreparable injury from the denial of the stay,"
3) "that the other parties will not be substantially harmed by the grant of stay," and
4) "that granting the stay will serve the public interest."

(Ibid., p. 741)

1) *Likelihood of prevailing on the merits.* Contrary to Defendant-Appellant's claim of support from "Every decision of the United States Courts of Appeal," this Court in *National Labor Relations Board* v. *Schill Steel Products, Inc.*, 408 F.2d 803 (5th Cir., 1969), permitted plaintiff access to statements and affidavits taken by the National Labor Relations Board during its investigation in a contempt proceeding. In *Schill*, this Court distinguished the case of *NLRB* v. *Clement Bros. Co., Inc.*, 407 F.2d 1027 (5th Cir., 1969), cited in the Motion *sub judice*. This Court pointed out that in *Clement* the respondent sought to discover *all* pre-hearing statement in the Board's possession, not just those made by witnesses from whom the Board adduced testimony. The request in the instant case is the same as was made in the *Schill* case since it

only relates to the *witnesses* which will be called by the Board at the hearing and *not* to *all* statements in the possession of the NLRB.

The District Court also distinguishes the *Title Guarantee Company* v. *NLRB* case, —— F.2d ——, 91 LRRM 2993 (2nd Cir., 1976), which the Defendant-Appellant cites and relies on. In *Title Guarantee* Judge Hancock notes the request was for copies of *all* written statements contained in the NLRB's files and any such statements subsequently available to the NLRB. Such request is broader than the request in the case at hand which only covered those statements which the NLRB would have to produce under its own rules (see 29 C.F.R. § 102.118(b)(1)).

Furthermore, the Order in the instant case is on all fours with the recent case of *Bellingham Frozen Foods* v. *Henderson*, —— F.S. ——,[1] 91 LRRM 2761 (W.D. Wash. 1976). In the *Bellingham* case the Court considered the same contentions made by the Board in its refusal to produce the requested materials in this case and ordered the NLRB to turn over the requested affidavits. The Court also enjoined the scheduled hearing until a reasonable time after the Board produced the requested statements and affidavits. The reasoning of the Court follows:

> ". . . the only issue before the Court is a legal one, to wit, whether Plaintiff is entitled as a matter of law to production of certain requested documents held by the agency, which documents the defendants claim are exempt from disclosure under 5 U.S.C. § 552(b), 5, 7(A), 7(B) and 7(C).
>
> "Plaintiff has been summoned to appear and defend an unfair labor practice charge made against plaintiff resulting in the issuance of a NLRB complaint. A date of March 9, 1976 has been set for the hearing.

[1] Many of the cases cited have not yet been published in the West System. Therefore, for the convenience of the Court we have attached copies of the decisions as reported in the Labor Relations Reference Manual to this Response. At the April 15, 1976 hearing, Defendant-Appellant's counsel stated he was not aware of any appeal to the *Bellingham* decision.

> Prior to the filing of this action, *plaintiff sought and was denied access to any and all statements and/or affidavits obtained by the Board of Witnesses to be called at the unfair labor practice hearing.*
>
> * * *
>
> "The Court is not persuaded by defendants' arguments that the requested documents are exempt from disclosure under Exemptions No. 5, 7(A), 7(C) or 7(D) of the Act. Defendants bear the burden of proving that documents in their possession are entitled to exempt status, and under the Act, all documents not exempt shall be made available to the public.
>
> * * *
>
> "The defendants suggest in their Answer and the Court rejects the argument that the statements and/or affidavits sought here are within the 'inter-agency or intra-agency *memorandums* or *letters*' language of Exemption 5 in the Act. (Emphasis supplied). The cases cited by plaintiff in its Memorandum support the conclusion that the statements requested herein are neither inter- nor intra-agency writings, nor memorandums nor letters which Congress sought to protect from disclosure.
>
> "Defendants assert that the requested documents are also properly exempt under Exemption 7 which bars disclosure of investigative records compiled for law enforcement purposes which would
>
> (A) interfere with enforcement proceedings, * * *
> (C) constitute an unwarranted invasion of personal privacy, [or]
> (D) disclose the identity of a confidential source . . .
>
> As the court found in two other cases raising identical issues (See attached Order, Local 32 v. NLRB, and Naturalike Photo Co. v. NLRB, 91 LRRM 2721, dated February 20, 1976) and so finds here, disclosure of the requested statements will not 'interfere with enforcement proceedings' as set forth in the Act.

The Board has not made any showing that would support the application of the Agency's 'Little Jencks Act Rule', 29 C.F.R., § 102.118(b), to the statements in question here. As the Fifth Circuit noted in NLRB v. Schill Steel Products, Inc., 408 F.2d 803 at 805, 70 LRRM 3280, rehearing denied 408 F.2d 807, 70 LRRM 3280 (5th Cir. 1969), *the statements requested are ones to be disclosed in the course of the hearing anyway.* The administrative trial here in a civil matter, and it is hard to conceive of a reason for applying a rule patterned after the criminal Jencks Act rule in such an agency proceeding. *Indeed, the only effect of applying such a rule is to insure that Bellingham Frozen Foods, Inc. and others similarly situated will not be adequately prepared to defend the unfair labor practice charges pending before them.*

"Promises of confidentiality by an agency to a supplier of information is not in itself enough to render a document exempt from disclosure under the Act. (See Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir., 1973) which applies in principle as well to post-amendment provisions). The Court is persuaded by the reasoning of the cases cited by plaintiff in its Memorandum, including Title Guarantee Co. v. N.L.R.B., —— F. Supp. ——, 90 LRRM 2849, 3238 (S.D. N.Y., Oct. 10, 1975), which have rejected the defendants' reliance on Exemption 7(C), that the statements requested herein are not exempt there under.

"Finally, the Board argues that Exemption 7(D) prohibits the disclosure of the documents in question. The Court rejects this contention as being without merit, since even the agency itself has agreed to provide such documents upon completion of its case in chief." (Emphasis added)

Other Courts have reached the same conclusion in similar cases. See *Maremont Corp.* v. *NLRB*, —— F.S. ——, 91 LRRM 2804 (W.D. Okla. 1976); *St. Elizabeth's Hospital* v. *NLRB*, —— F.S. ——, 91 LRRM 2453 (N.D. Ill. 1976); *Goodfriend Western Corp.* v. *Fuchs*, —— F.S. ——, 91 LRRM 2454 (Mass. 1976); *Local 32* v. *Irving*,

—— F.S. ——, 91 LRRM 2513 (W.D. Wash. 1976); *Cessna Aircraft Co.* v. *NLRB*, —— F.S. ——, 90 LRRM 2376 (Kan. 1975). See also, *Seafarers International Union AFL-CIO* v. *Baldovin*, 508 F.2d 125 (5th Cir. 1975) vacated 511 F.2d 1161.

Hence, contrary to Defendant-Appellant's contention, the likelihood is that Plaintiff-Appellee will prevail on appeal.

2) *Irreparable injury to Defendant-Appellant.* Defendant-Appellant cites no irreparable injury to itself if a stay is not granted. The only effect of not granting the request for a stay will be to cause Defendant-Appellant NLRB to reschedule the April 27, 1976 hearing which it set. It will not waive or lose any rights. These rights are the subject of the appeal. To grant a stay would have the effect of ruling on the merits of this case in favor of Defendant-Appellant, as the hearing relating to these affidavits is scheduled by the NLRB for April 27, 1976. There would be no damage to Defendant-Appellant if the stay is denied and the appeal is allowed to pursue its normal course.

3) *Harm to Plaintiff-Appellee if the stay is granted.* The NLRB's refusal to produce the documents which were requested and to which it is entitled under the Freedom of Information Act, as amended, deprives Plaintiff-Appellee of its statutory right to such information and will deprive Plaintiff-Appellee of a full opportunity to prepare its defense in the forthcoming hearing. See the cases cited under 1) supra and attached hereto.

If the stay is granted the NLRB will proceed with its April 27, 1976 hearing without having previously turned over to Plaintiff-Appellee the requested information. Post-hearing production of this information will be of no value as the record in the April 27, 1976 hearing would already have been made. Plaintiff-Appellee will be substantially injured if the requested documents are not turned over prior to the April 27, 1976 hearing.

4) *Serving the public interest.* The 1974 amendments to the Freedom of Information Act 5 U.S.C. § 552 were passed to protect the public interest. In *Stokes* v. *Brennan*, 476 F.2d 699 (5th Cir., 1973), this Court points out

that the Freedom of Information Act was amended to increase public access to government records through imposition of liberal disclosure requirements limited only by specific narrowly constructed exemptions. In passing these amendments Congress was trying to limit broad agency rules of non-disclosure so the Government might be more responsible and responsive to the public.

Plaintiff-Appellee respectfully submits Defendant-Appellant NLRB has not shown (1) that the District Court abused its discretion nor that (2) the additional four factors have been met warranting a stay of the District Court's Order.

WHEREFORE, for the reasons stated above, Plaintiff-Appellee requests this Court to deny Defendant-Appellant NLRB's Motion for Stay.

Respectfully submitted this 22nd day of April, 1976.

POELLNITZ, COX, ROBISON,
MCBURNEY & JONES

By: /s/ Charles A. Poellnitz
CHARLES A. POELLNITZ
ELARBEE, CLARK & PAUL

By: /s/ William M. Earnest
WILLIAM M. EARNEST
Attorneys for Plaintiff

ELARBEE, CLARK & PAUL
750 Coastal States Building
Atlanta, Georgia 30303
(404) 688-8000

POELLNITZ, COX, ROBISON, MCBURNEY & JONES
P.O. Box 876
Florence, Alabama 35630
(205) 764-0821

[Certificate of Service]

[filed April 26, 1976]

* * * * *

Before AINSWORTH, CLARK, and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for stay pending appeal is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2099

ROBBINS TIRE AND RUBBER COMPANY,
PLAINTIFF-APPELLEE

v.

NATIONAL LABOR RELATIONS BOARD,
DEFENDANT-APPELLANT

Nov. 21, 1977

Appeal from the United States District Court for the Northern District of Alabama before BROWN, *Chief Judge*, GODBOLD, *Circuit Judge*, and MEHRTENS, *District Judge*.*

GODBOLD, *Circuit Judge*:

This is a Freedom of Information Act (FOIA)[1] case, although it takes on the troubling coloration of a dispute about the discovery rights of respondents in National Labor Relations Board proceedings. The direct court[2] ordered the NLRB to turn over to Robbins Tire copies of all written statements of those who will be called to testify[3] in a consolidated representation and unfair labor practice proceeding involving that company. The order required that these documents be transmitted "on or before April 22, 1976, or, at the election of the Board,

* Senior District Judge of the Southern District of Florida, sitting by designation.

[1] 5 U.S.C. § 552, *as amended by* Act of Nov. 21, 1974, Pub.L.No. 93-502, 88 Stat. 1561.

[2] 92 L.R.R.M. 2586 (N.D. Ala., 1976).

[3] We do not know how many of those whose statements are sought here are employees of Robbins Tire, since the Board has never disclosed the materials even to the district court in camera. The court found it unnecessary to resort to in camera inspection of the statements because neither party disputed that they were prepared for use in the Board proceeding.

on or before a date which is at least five days prior to any hearing where the person making the statement or affidavit will be called as a witness."[4] A panel of this court has denied the Board's motion for a stay pending appeal, and the NLRB hearing has been held in abeyance for over a year pending the outcome of this appeal. We affirm.

[1] First, there is a jurisdictional problem. The Board argues that the effect of the order to disclose statements of witnesses was to enjoin its proceeding against the company. It casts its argument as an exhaustion requirement, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938), and asserting that Robbins Tire would suffer no irreparable injury if forced to challenge the Board's action afterwards on appeal, 29 U.S.C. §§ 160(e)-(f). *See also Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974); 51 St. John's L. Rev. 251, 254 n. 17 (1977). We need not decide whether or when a district court adjudicating a FOIA claim may enjoin ongoing or prospective NLRB proceedings in an effort to compel the disclosure required by the Act. In this case, the district court did not enjoin the hearing. The Board argues that this was the effect of its order. But whether or not an order constitutes an injunction is a question that does not turn on the subjective importance attached to it by the defendant and his resulting action in the circumstances. Like similar orders in the more conventional discovery context, this one gave the NLRB a choice. It could produce the statements, it could proceed without resort to the testimony of these particular affiants or it could forego the hearing. While the unpalatability of this choice might well form part of the rationale for finding a substantive exemption under FOIA,[5]

[4] The company had sought a longer preparation period of seven days.

[5] *See New England Medical Center Hosp.* v. *NLRB*, 548 F.2d 377, 384 (Cal., 1976) (denying FOIA disclosure on the merits, under exemption 7(A), for the same reasons). *But see* note 29, *infra*.

it cannot be transformed into a jurisdictional question by the Board's decision to hold its hearing in abeyance.

EXEMPTION 7(A)

The Board asserts that the statements of prospective witnesses fall within exemption 7(A), which protects against disclosure of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, * * *." 5 U.S.C. § 552(b)(7)(A). The issue here is whether pre-hearing disclosure of the contents of statements made by those prepared to testify in support of the Board's case would actually "interfere" with the Board's case. In *Goodfriend Western Corp.* v. *Fuchs*, 535 F. 2d 145 (CA1) (per curiam), *cert. denied*, 429 U.S. 895, 97 S. Ct. 257, 50 L. Ed. 2d 178 (1976), the First Circuit has held that it would.

[2] We think our answer can be found by ascertaining what Congress meant by "interfere," bearing in mind the dictum that FOIA was a comprehensive effort to publicize all agency action and that its exemptions are to be narrowly construed. *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360-61, 96 S. Ct. 1592, 48 L. Ed. 2d 11, 21 (1976). As Judge Oakes explained in the leading case of *Title Guarantee Co.* v. *NLRB*, 534 F. 2d 484 (CA2), *cert. denied*, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976),[6] this language was the result of a change

[6] Judge Oakes' rationale in *Title Guarantee*, which unlike our case did not involve a request limited to statements of prospective witnesses, has been persuasive enough to have formed the basis of every subsequent appellate decision under FOIA involving statements obtained by the NLRB in the course of unfair labor practice investigations. All of these cases have held exemption 7(A) applicable. *Goodfriend Western Corp.* v. *Fuchs*, 535 F.2d 145 (CA1), *cert. denied*, 429 U.S. 895, 97 S. Ct. 257, 50 L. Ed. 2d 178 (1976); *New England Medical Center Hosp.* v. *NLRB*, 548 F.2d 377 (CA1, 1976); *Roger J. Au & Son, Inc.* v. *NLRB*, 538 F.2d 80 (CA3, 1976); *NLRB* v. *Hardeman Garment Corp.*, 557 F.2d 559 (CA6, 1977); *Abrahamson Chrysler-Plymouth, Inc.* v. *NLRB*, 559 F.2d 1226 (CA7, 1977); *Harvey's Wagon Wheel, Inc.* v. *NLRB*, 550 F.2d 1139 (CA9, 1976); *Waldo Hosp. Ass'n, Inc.* v. *NLRB*, No. 76-3315 (CA9, Mar. 10, 1977) [unpublished Order]; *Climax Molybdenum Co.* v. *NLRB*, 539 F.2d 63 (CA10, 1976); *Cessna Aircraft Co.* v. *NLRB*, 452 F.2d 834 (CA10, 1976); *Maremont Corp.* v. *NLRB*, 79 CCH Labor Cases ¶ 77,790 (CA10, Oct. 5, 1976). *But see* 45 Geo.Wash.L.Rev. 114 (1976); 51 St. John's L.Rev. 251 (1977).

Several of these cases have expanded *Title Guarantee's* protections. As noted above, *Goodfriend* extended it to refuse a request limited to statements of those who would testify at a trial scheduled 24 hours later. *New England* applied it to exempt (1) statements of non-employees and (2) statements obtained in closed cases bearing a close temporal and factual relationship to pending cases. *But cf. Harvey's Wagon Wheel* (remanding for an initial determination of the applicability of exemption 7(A) to non-employee statements). Finally, *Climax Molybdenum* treated *Title Guarantee* as a per se rule, eliminating any need for an in camera inspection of the statements as permitted by 5 U.S.C. § 552(a)(4)(B).

On the other hand, *Deering Milliken, Inc.* v. *Irving*, 548 F.2d 1131 (CA4, 1977), while in dictum accepting the rationale of *Title Guarantee*, has refused to extend exemption 7(A) to protect affidavits in the context of a proceeding to determine only backpay claims after liability has been established.

offered by Senator Hart to the 1974 amendments to the FOIA after the bill had been reported out of committee. The purpose of Senator Hart's proposal was to restore the original intent of FOIA to require the agency to make a particularized showing that an investigatory file's disclosure would harm its case in court. "[I]t is only relevant to make [the exemption 7(A)] determination," Senator Hart emphasized, "in the context of the particular enforcement proceeding."[7] By making this change, Congress sought to eliminate unfounded judicial notions that a document's mere status as investigatory and enforcement-related would be sufficient to justify non-disclosure. Thus, the legislative history of exemption 7(A) reveals a sort of procedural emphasis.[8] Such an

[7] Staffs of House Comm. on Government Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents 333 (Joint Comm. Print 1975) [hereinafter cited as Source Book].

[8] Senator Hart's adoption of a prior ABA Committee proposal suggests that he was particularly concerned with refusals to disclose investigatory files from closed cases. *See* Source Book 334, 336-39, 351. But we view this as simply a particular manifestation of the need to change the exemption to require an inquiry in each

emphasis is strongly supplemented by the tenor of the 1974 amendments even before Senator Hart's change. As Senator Kennedy, the principal author and floor leader of the amendments, remarked, "With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions." Source Book 293.

We move next to the more substantive inquiry of what kind of interference Congress was concerned about avoiding in each particular case. Our only real clue lies in the remarks of Senator Hart:

> [Exemption 7(A)] would apply whenever the Government's case in court * * * would be harmed by

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situation as to whether disclosure would actually "interfere." Perhaps closed files might be so closely related to collateral proceedings pending before the agency that disclosure of them would still interfere. *See New England Medical Center Hosp.* v. *NLRB*, 548 F.2d 377 (CA1, 1976). Conversely, the particular concern with closed files in the legislative history does not indicate to us a determination that disclosure of files in open cases, simply because they are open, would necessarily qualify as interference under exemption 7(A). *Cf.* 45 Geo. Wash. L. Rev. 114, 124 (1976) (footnotes omitted):

"The *Title* court suggested that exemption 7(A) was enacted in 1974 to resolve the problem of the unavailability of closed investigatory files. The withholding of investigatory files pertaining to closed cases was a particularly egregious abuse of exemption 7 which exemption 7(A) certainly was designed to eliminate. The 1974 amendments, however, were not drafted in terms that require disclosure of closed files and nondisclosure of open files. Congress could have easily formulated such a distinction. The amendments were phrased instead to require agencies to establish under exemption 7(A) that interference with agency enforcement proceedings would result from disclosure. Thus, while the phraseology of exemption 7(A) assumes that nondisclosure can be justified only in the context of a pending enforcement proceeding, it requires the courts to consider whether disclosure would be harmful to that proceeding before granting a 7(A) exemption. This clearly implies that not all documents pertaining to pending proceedings are automatically exempted."

Whether or not all investigatory statements may be per se exempt for other reasons is a question we address below. The point we are making here is that it violates the intent of the Hart amendment to abdicate our responsibility to consider the specific harm to agency processes that disclosure might produce.

> the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding.

Source Book 333.[9]

The first sentence here suggests that the concern was with interference in the rather broad sense of premature revelation. Support for this idea can be found in Senator Hart's earlier statement that he wanted to return to the purpose revealed in the legislative history of the 1966 Act. This purpose was "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have." Source Book 332, *quoting* from H.R. Rep. No. 1497, 89th Cong. 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Admin. News pp. 2418, 1428. If this is what interference means, then we would be obliged to give an FOIA plaintiff-as-public-citizen no more information than he would obtain as a private litigant engaging in discovery before the agency. In *Title Guarantee*, for example, Judge Oakes began his analysis by observing that disclosure "would be tantamount to the issuance of new, broader discovery rules for NLRB proceedings," given Second Circuit limitations on the duty of the Board to grant pretrial discovery. 534 F. 2d at 487. However, we think that comparative discovery is not the key to the meaning of exemption 7(A).

[3] First, it is questionable whether FOIA disclosure would result in an increase in discovery rights in this court.[10] Although the Second Circuit has held that the National Labor Relations Act does not specifically au-

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[9] The central challenge to Senator Hart's proposal dealt with exemption 7(D) and the problems of safeguarding the confidentiality of informers so as to maintain effective law enforcement information gathering, with particular reference to the efforts of the FBI. *See* Source Book 340-43, 350-51. As a result, little further explication of "interference" exists.

[10] *Title Guarantee* recognized this problem. 534 F.2d at 487 n. 6.

thorize or require the Board to adopt discovery procedures,[11] this court, emphasizing the authority of 29 U.S.C. § 160(b),[12] has held that "when good cause is shown to the Board it should permit discovery in order that the rights of all parties may be properly protected." *NLRB* v. *Rex Disposables*, 494 F. 2d 588, 592 (CA5, 1974), *citing NLRB* v. *Safeway Steel Scaffolds Co.*, 383 F. 2d 273 (CA5), 1967), *cert. denied*, 390 U.S. 955, 88 S. Ct. 1052, 19 L. Ed. 2d 1150 (1968); *NLRB* v. *Miami Coca-Cola Bottling Co.*, 403 F. 2d 994 (CA5, 1968); *cf. NLRB* v. *W. R. Bean & Son, Inc.*, 450 F. 2d 93, 96 (CA5, 1971, *cert. denied*, 409 U.S. 849, 93 S. Ct. 57, 34 L. Ed. 2d 91 (1972) (*Safeway Steel* and *Miami Coca-Cola* place question within discretion of administrative law judge).[13] We have also held more specifically that statements of Board witnesses are discoverable in civil contempt proceedings that the Board brings to challenge noncompliance with appellate court decrees. *NLRB* v. *Schill Steel Products, Inc.*, 408 F. 2d 803 (CA5, 1969).[14] We conclude from these authorities that, with respect to the statements of prospective witnesses, some right to discovery exists

[11] *NLRB* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 859-60 (CA2, 1970), *cert. denied*, 402 U.S. 915, 91 S. Ct. 1375, 28 L. Ed. 2d 661 (1971).

[12] "[NLRB unfair labor practice proceedings] shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States. * * *"

[13] The recent FOIA case of *Sealand Terminal Corp.* v. *NLRB*, 414 F.Supp. 1035 (S.D. Miss., 1976), found the *Rex Disposables* line of authorities unpersuasive arguments for FOIA disclosure because these cases had held that the Board's failure to grant discovery had been harmless error. We do not agree with this logic. We are asking whether FOIA disclosure would give a litigant earlier or greater access to investigatory files than he would otherwise have. For this purpose, it seems irrelevant whether a Board examiner's error in failing to allow pretrial discovery was harmless. Our only injury should be the abstract one of whether the right to discovery exists.

[14] The *Schill Steel* panel left open whether its rule would apply to Board proceedings as well, 408 F.2d at 808, as did *Morgan Precision Parts* v. *NLRB*, 411 F.2d 1210, 1214 & n. 5 (CA5, 1971).

under the National Labor Relations Act.[15] Thus, we cannot agree with the Board's assertion that disclosure of witnesses' statements would inevitably interfere with enforcement proceedings even in the sense that it would always allow litigants greater discovery than they otherwise would obtain.

Second, focusing on comparative discovery rights, even if it gave us a clearer answer, would violate the spirit of the procedural reform sought by the Hart amendment. The change, as we have noted above, sought to require a showing that some "specific harm might result to [the government's] case from disclosure," *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1135 (CA4, 1977). If the mere fact that one could not have obtained the document in private discovery were enough, the Board would have made naught of the requirement that nondisclosure be permitted "only to the extent that * * * production * * * would * * * interfere" in some way. We must interpret the exemptions to give meaning to this requirement.

Finally, tying FOIA rights to the discovery rights of the particular plaintiff presents us with a legal conundrum that suggests the improbability of such a congressional intent. In order to apply the comparative discovery test, we must look to the particular needs of the plaintiff (in order to see whether he has shown good cause for production). But the Act mandates release of information "to any person." 5 U.S.C. § 552(a)(3). For this reason, anyone's case is as strong (or as weak) as anyone else's. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10, 95 S. Ct. 1504, 1513, 44 L. Ed. 2d 29, 43 n. 10 (1975): "[Plaintiff's] rights under [FOIA] are neither increased nor decreased by reason of the fact that it claims an interest in the [documents sought] greater

[15] We deal with the work product privilege analogy below in addressing the Board's claim under exemption 5. We see no reason why the analogy should provide for any different analysis under exemption 7(A)'s "no earlier or greater access" theory than under exemption 5's express test of "not * * * available by law to a party * * * in litigation with the agency."

Title Guarantee expressly avoided relying on this analogy. 534 F.2d at 491.

than that shared by the average member of the public." Thus, to hold that certain groups—members of the news media, for example—are the real beneficiaries of FOIA is to create a pecking order unjustified by the language of the statute.[16] "[A]ll citizens have a right to know" what their government is doing. S. Rep. No. 813, 85th Cong., 1st Sess. 6 (1965).[17]

[4] In sum, we reject "earlier or greater access" as a kind of interference protected against by exemption 7(A). We think that the protection against interference involves a focus not on the rights of the individual FOIA plaintiff but rather on the problems posed to the particular agency proceeding. We thus proceed to an examination of the possible harms that could befall Board proceedings

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[16] On the other hand, neither can Robbins Tire gain any leverage under FOIA from the particular unfairness caused here by what some have referred to as the Board's "trial by ambush," *see Capital Cities Communications, Inc.* v. *NLRB*, 409 F.Supp. 971, 977 (N.D. Cal., 1976).

[17] Our problem here is quite similar to that posed by exemption 5, which expressly allows the withholding of memoranda "which would not be available by law to a party * * * in litigation with the agency." 5 U.S.C. § 552(b)(5). Professor Davis has noted in this context:

"When a memorandum or letter would be subject to discovery by a party whose need for it is strong but not by a party whose need for it is weak, letting required disclosure depend upon the facts about the particular applicant would violate the provision that disclosure must be made to 'any person.' The agency cannot say that one person is 'any person' but that another person is not." K. Davis, Administrative Law Text § 3A.21, at 83 (1972). As a result, he says, "the courts in giving meaning to the fifth exemption have been guided less by discovery law than by the policies behind the fifth exemption." K. Davis, Administrative Law of the Seventies § 3A.21, at 92 (1976). *See also EPA* v. *Mink*, 410 U.S. 73, 86, 93 S. Ct. 827, 835, 35 L. Ed. 2d 119, 131-32 (1973); *Kent Corp.* v. *NLRB*, 530 F.2d 612, 620-21 & n. 20 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976).

The exemption 5 problem is one posed by statutory language. The analogous difficulty under exemption 7(A) results from the less persuasive context of remarks in the legislative history. We therefore feel more at liberty to fashion our own definition of interference.

by pretrial disclosure of witnesses' statements.[18] Indeed, a precise reading of *Title Guarantee* reveals that this was the approach taken there. Although, as we have noted, Judge Oakes referred to the expansion of discovery rights, his finding of exemption arose not from the mere conclusion that such rights would otherwise be expanded but from the doubt that Congress intended to so expand them in view of a (judicially perceived) likelihood for interference in the proceedings that might result:

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings. It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended. * * * In light of the delicate relationship which exists between employer and employee, we think that Congress could be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act wihch, while dealing with disclosure generally, does not purport to affect such discovery.

534 F. 2d at 491-92 (footnotes omitted). Senator Hart's second sentence in his aforementioned explanation of what he meant by interference (a diminished ability to collect investigatory information) suggests a similar judicial inquiry into the precise nature of the harm to the agency's case.[19]

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[18] The Board has the burden of proving any such harm. 5 U.S.C. § 552(a)(4)(B).

[19] We do not interpret *U.S.* v. *Murdock*, 548 F.2d 599, 602 (CA5, 1977), as requiring any different conclusion here. The *Murdock*

As we have noted, *Title Guarantee* involved a request for copies of all statements, without regard to whether the affiants would be called to testify. Part of the rationale for denying the right to disclosure was "the delicate relationship which exists between employer and employees.[20] *See also Roger J. Au & Son, Inc.* v. *NLRB*, 538 F. 2d 80, 83 (CA3, 1976) ("peculiar character of labor litigation"); *Climax Molybdenum Co.* v. *NLRB*, 539 F. 2d 63, 65 (CA10, 1976) ("relationship between employer and employee is a delicate one which calls for limitations on discovery"). There is inherent in this concern an assumption that the Board would be unable to obtain testimony from employees to aid in its prosecution if their statements would become the knowledge of their employer. Even discounting the problem that we do not know which of the affiants here are employees,[21] this sweeping assumption of intimidation is inappropriate here, where the request is limited to statements of witnesses. As this

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panel, dealing with a FOIA plaintiff being prosecuted for criminal tax violations, did go so far as to say:

"We hold the discovery provisions of the Federal Rules of Criminal Procedure and the FOIA provide two independent schemes for obtaining information through the judicial process. Although information obtained through the FOIA may be useful in a criminal trial, we find that the FOIA *was not intended* as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already provided by the Federal Rules of Criminal Procedure." (Emphasis supplied.)

As in *Title Guarantee*, which *Murdock* cited, we think the underlying rationale lay not in the comparison of discovery rights per se but rather on the special dangers that discovery would pose to a criminal prosecution. These were so great that Congress could not possibly have intended disclosure. Whether the dangers in this different context are similar is a question we address below.

[20] Indeed, the peculiar problem of intimidation involved in such a relationship explains why the court restricted its holding to NLRB settings. 534 F.2d at 492.

[21] *Title Guarantee* involved employee and union affiants, making no distinction in protecting the statements from disclosure because the court felt that union representatives might also be intimidated, through premature disclosure of their negotiating position. 534 F.2d at 485, 491. *But cf. Harvey's Wagon Wheel, Inc.* v. *NLRB*, 550 F.2d 1139 (CA9, 1976) (remanding on this point).

court said in *Schill Steel*, "Informers who actually testify * * * surface automatically." 408 F. 2d at 805.[22] As the First Circuit admitted in *Goodfriend*, "it may well be that [such] circumstances minimize the possible interference with the pending proceedings." 535 F. 2d at 147.[23]

In the present situation, there may be some risk of interference with Board proceedings in the form of witness intimidation from harassment of an employee-witness during the five days prior to the hearing,[24] done in an effort to silence him or dilute the nature of his testimony. Such harassment would constitute an unfair labor practice under 29 U.S.C. § 158(a)(4) [25] *NLRB* v. *Scrivener*, 405 U.S. 117, 92 S. Ct. 798, 31 L. Ed. 2d 79 (1972). Any attorney interrogation of the affiants extending beyond "that legitimately necessary for the preparation of respondent's defense" to the underlying unfair labor practice charge would run a risk of incurring section 8(a)(1) liability. *See, e.g., NLRB* v. *Ambox, Inc.*, 357 F. 2d 138, 141 (CA 5, 1966); *Texas Industries, Inc.* v. *NLRB*, 336 F. 2d 128, 132-34 (CA 5, 1964); *NLRB* v. *Hardeman Garment Corp.*, 557 F. 2d 559, 563 n. 9 (CA 6, 1977). Nevertheless, post hoc discipline does not necessarily dissipate the anxieties of those upon whom the intimidation may be visited. We understand the Board's position in this regard, dependent as it is upon charges initiated by others before it issues its complaints. See *NLRB* v. *Sears*,

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[22] *Schill Steel* distinguished *NLRB* v. *Clement Bros. Co.*, 407 F.2d 1027 (CA5, 1969), in part on the basis that the intimidation problem there resulted from the fact that the discovery sought included statements of non-witnesses, *id.* at 1030-31.

[23] In that case the court found interference in the fact that the respondent would gain discovery rights.

[24] Harassment after testimony at trial, of course, would be as likely for a witness with or without prehearing disclosure.

[25] "(a) It shall be an unfair labor practice for an employer—

* * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter; * * *"

Roebuck & Co., 421 U.S. 132, 138-39, 95 S. Ct. 1504, 1510-1511, 44 L. Ed. 2d 29, 40-41 (1975).[26]

[5, 6] However, the Board has not introduced any evidence tending to show that this kind of intimidation (either to physical or employment security) is likely to occur during the five days between discovery and the Board hearing in this case. While we do not purport to establish an exclusive set of criteria for looking at this question, there are numerous factors that bear upon such an inquiry: whether the history of labor relations in the community and at the plant makes intimidation of these witnesses reasonably foreseeable; whether the witnesses work in jobs (with Robbins Tire or not) or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give. *See Temple-Eastex, Inc.* v. *NLRB*, 410 F. Supp. 183 (E.D. Tex., 1976) (ordering disclosure of witness statements favorable to employer).[27] Instead, the Board has asserted

[26] On petition for rehearing in *NLRB* v. *Schill Steel Prods., Inc.*, 408 F.2d 803, 807-08 (CA5, 1969), a panel of this court discounted this problem of intimidation during the period between discovery and trial:

"In the petition here the Board asserts that the prospect of prehearing discovery is somehow more intimidating than the prospect of discovery under the Jencks Act because it will give the employer more time to confront the informing employee. Given that the name of an informer will be revealed, we confess that we are unable to see the connection between added time and substantially greater coercion."

Id. at 807. We reach our conclusion here without considering whether we could draw the same conclusion about human nature as a matter of law in every Board proceeding as opposed to the rather unique context there of discovery in our own court. *See* note 14, *supra*.

[27] The answers to some of these sorts of questions might require in camera inspection pursuant to 5 U.S.C. § 552(a)(4)(B). *Cf. Kent Corp.* v. *NLRB*, 530 F.2d 612, 624 n. 30 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976).

Whether or not courts are "ill-fitted to make such determinations," *Climax Molybdenum Co.* v. *NLRB*, 539 F.2d 63, 85 (CA10, 1976), is irrelevant in the face of what we perceive to be a congressional directive to do so. Acoerding to one commentator, even the experts

that in every case the potential for intimidation is so great as to require nondisclosure of all statements and affidavits. This sort of per se approach to exemption 7(A) is inconsistent with the procedural reform effected by the Hart amendment. FOIA requires disclosure absent the agency's ability to prove[28] the applicability of exemption 7(A) in the context of the particular proceeding involved. We hold that the Board has not sustained its burden of proving that the possibility of intimidation in this case through disclosure to Robbins Tire brings exemption 7(A) into play.[29]

EXEMPTION 7(C)

[7] Exemption 7(C) protects these statements and affidavits from disclosure only to the extent that production would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The district court rejected this claim since (1) Robbins Tire seeks disclosure only of statements taken from those scheduled to testify at the Board hearing and (2) the Board's own rules[30]

have "strongly held and widely disparate opinions on the reality of employee fear as an inhibiting factor in securing statements from witnesses." 51 St. John's L. Rev. 251, 268 n. 92 (1977).

[28] The Board's per se rule would not satisfy the burden FOIA imposes even if it had resorted to the sort of conclusory affidavit employed to provide "evidence" of inevitable intimidation in *Harvey's Wagon Wheel, Inc.* v. *NLRB*, 550 F.2d 1139, 1142 (CA9, 1976). The statutory scheme requires proof of adjudicative, not legislative, facts.

[29] It might be argued that the mere delay that this FOIA suit creates to the Board process of enforcing the provisions of the NLRA constitutes exemption 7(A) interference. *New England Medical Center Hosp.* v. *NLRB*, 548 F.2d 377, 384 (CA1, 1976). But giving such scope to this exemption would result in a per se rule that any FOIA suit designed to obtain investigatory files would fail if it coincided with a scheduled hearing. For the reasons we have indicated, we think this result inconsistent with the intent of the statute as amended.

[30] 29 C.F.R. § 102.118(b)(1) (1976). This rule, which is modeled after the Jencks Act, 18 U.S.C. § 3500, applies as well to representation cases. 29 C.F.R. § 102.118(c) (1976).

allow disclosure of the statements after the direct examination of the witnesses at that hearing.

We agree. The Board concedes that there is nothing unusual in the nature of personal or family details in these affidavits that suggests the need for protection. *See Title Guarantee*, 534 F. 2d at 489 n. 10 (dictum). In addition, as the district court noted, this is purely a matter of when the witnesses' statements are to be revealed, and there is therefore no privacy interest involved. "Disclosure of this same information is not an unwarranted invasion of the claimants' privacy simply because it occurs before the hearing." *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1136 (CA4, 1977). Accordingly, we need not engage in balancing privacy rights against the right of the public to be informed. *Cf. Department of the Air Force* v. *Rose*, 425 U.S. 352, 370-82 & n. 16, 96 S. Ct. 1592, 1603-1609 & n. 16, 48 L. Ed. 2d 11, 26-33 & n. 16 (1976) (exemption 6).

EXEMPTION 7(D)

[8] This exemption protects against disclosure that would "disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). The Board asserts that section 10058.4 of its Case Handling Manual requires that the affiant "should be told the truth—that the information would be used by us in ascertaining the total picture and that this would be its only use unless and until he might be called on to give information in the form of testimony at a formal hearing or in the unlikely event another agency made a valid request upon us for such information." We do not know whether this "express assurance" was given here, and we question how unconditional an assurance of confidentiality it is anyway. However, employee-employer context might in some situations provide "circumstances from which such an assurance could be reasonably inferred." [31] *Cf. Texas Industries, Inc.*

[31] We draw these explanations of what may create confidentiality from language in the conference report on the 1974 amendments to the FOIA:

"The substitution of the term 'confidential source' in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information." Source Book 230 (Conf. Rep. No. 93-138, 93d Cong., 2d Sess. 1974)).

Of course, here the Board has offered no specific evidence concerning the Robbins Tire situation from which a court might draw such a reasonable inference. *See Title Guarantee*, 534 F.2d at 489-90 n. 11 (dictum). Its exemption 7(D) position, like its positions regarding the exemptions already discussed, is a per se one. But the question here, too, is ordinarily one of fact. *Deering Milliken, Inc.* v. *Irving*, 548 F.2d 1131, 1137 (CA4, 1977).

v. *NLRB*, 336 F. 2d 128, 134 (CA 5, 1964) (importance of preserving confidentiality of employee statements). However, as the district court held, the Board's case under exemption 7(D) fails for the same reason that exemption 7(C) fails: all the statements sought here come from those who are scheduled to testify at trial anyway. If one's identity is certain to be disclosed, we cannot characterize him as one of the sources given either express or implied assurance of confidentiality.[32]

EXEMPTION 5

Finally, the Board asserts that the statements and affidavits taken from prospective witnesses are protected from disclosure by exemption 5, which exempts "interagency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). In contrast with its position on exemption 7(A), the Board has not met

[32] *Cf. Climax Molybdenum Co.* v. *NLRB*, 407 F. Supp. 208, 209 (D. Colo., 1975), *aff'd on other grounds*, 539 F.2d 63 (CA10, 1976); *accord, Mylan Pharmaceuticals, Inc.* v. *NLRB*, 407 F. Supp. 1124, 1127 (W.D. Pa., 1976). These cases argue that all interviewees are potential witnesses and that they therefore can never be considered confidential sources. We do not express an opinion on the applicability of exemption 7(D) with respect to statements of those not scheduled to be called at the Board hearing.

with much success with this argument. *See Title Guarantee*, 534 F. 2d at 492-93 n. 15 (dictum); *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1138, (CA4, 1977); *Marathon LeTourneau Co.* v. *NLRB*, 414 F. Supp. 1074, 1080 (S.D. Miss., 1976).

Exemption 5, which unlike exemption 7 remained unchanged by the 1974 amendments, has been held to encompass the work-product privilege of *Hickman* v. *Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947). *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154, 95 S. Ct. 1504, 1518, 44 L. Ed. 2d 29, 49 (1975); *Kent Corp.* v. *NLRB*, 530 F. 2d 612, 618 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976). The basic disagreement between the Board and Robbins Tire here is whether the distinction between "factual" and "deliberative" materials fashioned in *EPA* v. *Mink*, 410 U.S. 73, 87-88, 93 S. Ct. 827, 836, 35 L. Ed. 2d 119, 132 (1972), in connection with executive privilege was intended to be or can be extended to cases involving the work-product privilege. If in fact Congress means to incorporate *Hickman* in all its complexity into exemption 5 as a sort of direct legal transplant, the witness statements in this case would be exempt from disclosure, for *Hickman* protected even relevant and non-privileged witness statements unless production "is essential to the preparation of one's case." 329 U.S. at 511, 67 S. Ct. at 394, 91 L. Ed. 2d at 462 Since as we have noted FOIA prohibits looking at the needs of the particular plaintiff in ruling on the applicability of the exemptions, such statements would not "normally" or "routinely" be disclosed in private litigation. *Sears*, 421 U.S. at 149 & n. 16, 95 S. Ct. at 1515 & n. 16, 44 L. Ed. 2d at 46 & n. 16, *citing* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). On the other hand, if *Hickman* as applied to exemption 5 does not protect factual materials, these statements would have to be disclosed. They constitute purely factual testimony regarding events at the plant.

[9] We think that the *Hickman* privilege as read into exemption 5, like the executive privilege, must be applied consistently with Congress' intent to protect only against

disclosure of governmental policy-making processes.[33] The general concern surrounding exemption 5 was to guard against stifling flexibility of viewpoints before agencies arrive at final institutional decisions. As the House Report noted the exemption was a response to testimony from agency witnesses

> that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl."

H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* [1966] U.S. Code Cong. & Admin. News, pp. 2418, 2427.[34] Since the purpose of exemption 5 was to protect agency deliberative processes, purely factual material such as verbatim witness statements must not fall within it, whether the agency urges upon us the executive or the work-product privilege. *See Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1138 (CA4, 1977).

[10] While the *Mink* Court spoke in the more conventional exemption 5 context of an assertion of executive privilege, we do not interpret its discussion to be restricted to that context. The Court described in some detail the difficult language as well as the legislative history of exemption 5. While noting the problems involved in applying discovery analogies without inquiring as to individual need,[35] the Court observed that one thing about

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[33] As noted above, we must construe FOIA exemptions narrowly. *Rose*, 425 U.S. at 360-61, 95 S. Ct. at 20-21, 48 L. Ed. 2d at 21. With respect to exemption 5 in particular, see S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) ("The committee * * * has attempted to delimit the exception as narrowly as consistent with efficient Government operation.").

[34] *See also* Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi. L. Rev. 761, 795 & n. 88 (1967); Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda*, 86 Harv. L. Rev. 1047, 1049 & nn. 11-12 (1973).

[35] *See* note 17, *supra*.

exemption 5 was certain: "Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions * * * are privileged from inspection.'" 410 U.S. at 86, 93 S. Ct. at 836, 35 L. Ed. 2d at 132.[36] Justice White supported this position by citing the House and Senate reports to which we have referred. He then articulated the deliberative-factual distinction, and in doing so cited cases such as *Soucie* v. *David*, 448 F. 2d 1067 (CADC, 1971). *Soucie* was not confined to the executive privilege context; there the D.C. Circuit was promulgating broad guidelines for the handling of the exemption 5 issue on remand. *See also Bristol-Myers Co.* v. *FTC*, 424 F. 2d 935 (CADC), *cert. denied*, 400 U.S. 824, 91 S. Ct. 46, 27 L. Ed. 2d 52 (1970) (cited in *Mink*). Finally, Justice White explained that the first version of exemption 5 had definitively exempted only "memorandums or letters dealing solely with matters of law and policy."[37] The only reason for the change in final wording was not to weaken this deliberative-factual distinction but to assure that factual material inextricably intertwined with deliberative material would also be exempt. *Mink*, 410 U.S. at 90-91, 93 S. Ct. at 837, 35 L. Ed. 2d at 134. *Mink's* extensive analysis of exemption 5 as a whole shows that the case should properly be read as an exemption 5 case, not simply an executive privilege case. It paints with a broad brush, like other decisions both before and after it. *See, e.g., National Courier Association* v. *Board of Governors*, 516 F. 2d 1229, 1242 (CADC, 1975); *Schwartz* v. *IRS*, 511 F. 2d 1303, 1305 (CADC, 1975); *Tennessean Newspapers, Inc.* v. *FHA*, 464 F. 2d 657, 660 (CA6, 1972); *Soucie, supra; GSA* v. *Benson*, 415 F. 2d 878 (CA9, 1969). This court has described exemption 5 in the following way:

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[36] Cf. Sears, 421 U.S. at 154, 95 S. Ct. at 1518, 44 L. Ed. 2d at 49:

"Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy."

[37] In fact, S. Rep. No. 1219, 88th Cong., Sess. 13-14 (1964), accompanying this version noted that "there is no exemption for matters of a factual nature."

THE "MEMORANDUM" EXCEPTION

> * * * Whatever may be the scope of this exception, with its cryptic limiting phrase "which would not be available by law to a party other than an agency in litigation" * * * we think it would be a perversion of the Act to classify the materials sought in this case [OSHA training manuals] as within this provision which is designed to encourage the free exchange of ideas among government policymakers. It was not defined as an exception to compelled disclosure in order to authorize an agency to throw a protective blanket over any type of information it might choose by the expedient of casting it in the form of an internal memorandum. *Bristol Myers Co.* v. *F.T.C.*, 424 F. 2d 935 (D.C. Cir.), cert. denied, (1970). Substance not form determines its availability by the public. * * * The subject manual is an impersonal, mass-produced statement of established policy designed to be utilized as an educational and reference tool, not for policymaking or deliberative purposes. If this material be a "memorandum" then the term would cover virtually all government documents of any description or nature. Such an interpretation would be at war not only with the plain meaning of the word but also with the spirit and purpose of the Act. Whatever the ultimate scope of this "memorandum" exception may be, we are confident that these materials would remain without its reach.

Stokes v. *Brennan*, 476 F. 2d 699, 703-04 (CA5, 1973). There is no suggestion here that the factual-deliberative distinction only defines the scope of the executive privilege. It is inherent in the purpose of exemption 5.

Indeed, we suggested the answer to this case in *Kent Corp.* v. *NLRB*, 530 F. 2d 612, 623-24 (CA5), *cert. denied*, 429 U.S. 920, 97 S. Ct. 316, 50 L. Ed. 2d 287 (1976), in which we held protected under exemption 5 "final investigation reports" prepared by NLRB staff members. These reports summarized the evidence of un-

fair labor practices (gained by witness interviews such as those actually requested here) and recommended dispositions as to the various charges. Discussing the work-product privilege and *Hickman*, we held that even the factual information contained in these reports was protected. But our approach emphasized the deliberative nature of the report process into which these facts were integrated and contrasted these documents with the precise sort of "primary information" that is involved in this case:

> In our view, even the factual matters in these reports (which might not be protected by executive privilege) are protected by the work-product privilege. Writing in contemplation of forthcoming unfair labor practice litigation, an attorney must be able not only to discuss doctrinal theories but also to "assemble information, [and] sift what he considers to be the relevant from the irrelevant facts" without feeling that he is working for his adversary at the same time. *Hickman* v. *Taylor*, 329 U.S. at 511, 67 S.Ct. at 393, 91 L. Ed. at 462. The feeling would be well justified if we allowed the FOIA to be used to force disclosure of such materials.
>
> This case is a particularly strong one for recognizing the privilege. *The contents of the reports are not primary information, such as verbatim witness testimony or objective data*, but rather are mainly reports on how the Birmingham attorneys appraised the evidence they found. Thus the reports consist largely of "mental impressions, conclusions, opinions, [and] legal theories" within the meaning of the Federal Rule. Such materials, if prepared in anticipation of litigation or for trial, are always protected by a properly-raised claim of work product privilege, regardless of the opposing litigant's need.

530 F. 2d at 624 (emphasis added).

Mink, *Stokes*, and *Kent* all admit the difficulties involved in administering a statutory standard that ordinarily turns on individual need but prohibits courts from

assessing such factors in the FOIA context. *See* note 17, *supra*. Whether as in *Stokes* we resolve the problem by focusing on the word "memorandum" and concluding that factual witness statements are not encompassed within that term,[38] or whether we conclude that in constructing its exemption 5 discovery analogy Congress had no inkling of the ramifications of the qualified part of the *Hickman* privilege,[39] we cannot reconcile withholding these statements with exemption 5's narrow policy of safeguarding the thought processes of the agency as an institutional thinker.

The Board has failed to sustain its statutory burden of proof as to exemptions 7(A), 7(C), 7(D), and 5. The district court's order compelling disclosure is affirmed.

AFFIRMED.

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[38] *See also Title Guarantee Co.* v. *NLRB*, 407 F.Supp. 498, 502 (SDNY), *rev'd on other grounds*, 534 F. 2d 484 (CA2), *cert. denied*, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

[39] For a fuller description of these two approaches, see Note, supra, note 34, at 1049-51.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2099

D.C. Docket No. CA76-H-528 NW

ROBBINS TIRE AND RUBBER COMPANY,
PLAINTIFF-APPELLEE,

v.

NATIONAL LABOR RELATIONS BOARD,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Northern District of Alabama

Before BROWN, *Chief Judge*, GODBOLD, *Circuit Judge*, and MEHRTENS, *District Judge**

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was urged by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 21, 1977.
Issued as Mandate: December 13, 1977.

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*Senior District Judge of the Southern District of Florida, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. 77-911

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ROBBINS TIRE AND RUBBER COMPANY

ORDER ALLOWING CERTIORARI

Filed February 21, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 258907 111